APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **Brian Yoshio Furuya**

2. Have you ever used or been known by any other name? **Yes** If so, state name: **Brian Y. Furuya and Brian Furuya**

3. Office Address: **Coconino County Attorney's Office**
110 East Cherry Avenue
Flagstaff, Arizona 86001

4. How long have you lived in Arizona? **13 years**

   What is your home zip code? **86005**

5. Identify the county you reside in and the years of your residency.

   Coconino County for 13 years (Aug. 3, 2007 to present)

6. If nominated, will you be 30 years old before taking office? ☒ yes ☐no

   If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? ☒ yes ☐no

7. List your present and any former political party registrations and approximate dates of each:

   (The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

   - **Independent (Coconino County, Arizona: 2019 to present)**
   - **Republican (Coconino County, Arizona: 2007 to 2019)**
   - **Republican (Utah County, Utah: 2000 to 2007)**
   - **Republican (Los Angeles County, California: 1997 to 2000)**

8. Gender: **Male**

   Race/Ethnicity: **Asian/Japanese**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

J. Reuben Clark Law School, Brigham Young University
Location: Provo, Utah
Dates: 2004 – 2007
Degree: Juris Doctorate

Brigham Young University
Location: Provo, Utah
Dates: 1997; 2001 – 2003
Degree: Bachelor of Arts

10. List major and minor fields of study and extracurricular activities.

Graduate

Field of Study: **Law**

Extracurricular Activities:

- **BYU Journal of Public Law, where I worked first as a staff member and later served as a member of the Editorial Board for that publication.**

Undergraduate

Field of Study: **Major: Political Science**
Minor: Philosophy (logic emphasis)

Extracurricular Activities:

- **Legislative Internship, Utah State Legislature-House of Representatives (worked for Asst. Majority Whip, Michael R. Styler of Delta, UT)**

- **Active in church activities and consistently volunteered during my undergraduate and graduate education, including administrative services, teaching, and various community service projects**

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

Graduate:

- Highest Honors: Real Estate Development; Healthcare Law
- Managing Editor of Articles (Editorial Board), BYU Journal of Public Law
- Teaching Assistant, Prof. Larry Farmer, PhD (2006 – 2007)
- Summer Associate, Aspey, Watkins & Diesel, P.L.L.C. (2006)
- Extern, U.S. Attorney's Office, Dist. of Utah (2005)
- Research Assistant, Prof. David A. Thomas, J.D. (2005)
- Merit Scholarship (2004 – 2005)

Undergraduate:

- Graduated Cum Laude
- Member, Phi Kappa Phi (Honor Society)
- Member, Pi Sigma Alpha (Political Science Honor Society)
- Merit Scholarships, 2001, 2002
- Dean's List (2002)
- Teaching Assistant, Prof. Ralph C. Hancock, PhD
- Scenic Carpenter, BYU Theater Dept.
- Volunteered 2 years as a missionary in Germany for the Church of Jesus Christ of Latter-day Saints

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

- **Arizona Supreme Court (admitted November 9, 2007)**
- **United States District Court, District of Arizona (admitted November 28, 2007)**
- **United States Circuit Court of Appeals for the Ninth Circuit (admitted August 7, 2012)**
- **Navajo Nation Supreme Court (admitted June 3, 2008)**

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No**

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No**

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Coconino County Attorney, Position: Deputy County Attorney	**Jan. 2016 – Present**	**Flagstaff, AZ**
Aspey, Watkins & Diesel, PLLC, Position: Attorney	**Aug. 2007 – Dec. 2015**	**Flagstaff, AZ**
J. Reuben Clark Law School, Position: Assistant Lecturer	**Jul. 2007 – Apr. 2010**	**Provo, UT/online**
J. Reuben Clark Law School, Position: Teaching Assistant	**Aug. 2006 – Apr. 2007**	**Provo, UT**
Aspey, Watkins & Diesel, PLLC, Position: Summer Associate (Intern)	**May. 2006 – Aug. 2006**	**Flagstaff, AZ**
Jaussi & Christiansen, Position: Paralegal (Summer Temp.)	**Jul. 2005 – Aug. 2005**	**Provo, UT**

J. Reuben Clark Law School, Position: Research Assistant	**Apr. 2005 – Jul. 2005**	**Provo, UT**
Law Student	**Sept. 2004 – Apr. 2007**	**Provo, UT**
Jonathan L. Jaussi, LLC, Position: Paralegal/Office Manager	**Apr. 2004 – Jul. 2004**	**Provo, UT**
Jaussi & Christiansen, Position: Paralegal	**May 2003 – Mar. 2004**	**Provo, UT**

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Please see "Attachment A"

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

My present practice over the last four years has been in public service as a deputy county attorney, where I have been assigned to the civil division. On behalf of Coconino County Board of Supervisors, Treasurer, Assessor, Sheriff, Jail District, Public Health Services District, Community Development, a dozen fire districts, and the County Attorney, I have performed a wide variety of tasks, including property tax valuation disputes, zoning, building, and health code enforcement litigation, civil appellate work, contract review, ordinance review and drafting, civil asset forfeiture, and advising government agencies on matters of legal compliance and liability.

The major areas of law in which I practiced over the last five years include:

- **Contracts (25%);**
- **Government Compliance (15%);**
- **Property Tax (15%);**
- **General Civil Litigation (10%);**
- **Real Estate & Land Use (10%);**
- **Civil Asset Forfeiture (10%);**
- **Employment (10%);**
- **Public Health (3%);**
- **Bankruptcy (2%)**

17. List other areas of law in which you have practiced.

At Aspey, Watkins & Diesel, I had a broad general civil law practice, focusing primarily upon commercial/business transaction and litigation, real estate transactions and litigation, personal injury (mainly plaintiff, but some defense), and appellate work. I also practiced frequently in landlord-tenant law, debt collection, Navajo tribal law, and bankruptcy. I have some more limited experience in family law, civil rights, and probate litigation.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

Not Applicable

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

I have extensive, wide-ranging experience in negotiating and drafting legal documents. A major part of my current government practice involves negotiating contracts of all sorts on behalf of public clients. I have been intimately involved in negotiating and drafting everything from a labor Memorandum of Understanding for a fire district's relationship with its resident union, to intergovernmental agreements between city, county, state, federal, and tribal authorities on a wide variety of subjects and purposes, to development agreements for private contractors, to simple purchase contracts for goods and services. And of course, I have drafted many settlement agreements in the litigation context.

In my private practice, I negotiated and drafted important legal documents for businesses and private clients alike. Representative of the documents I negotiated and created include real estate purchase contracts, loan promissory notes, deeds of trust, other security instruments, corporate bylaws and partnership agreements, stock purchase agreements, shareholder agreements, waivers and limitations of liability, business service contracts, business merger agreements, business drug testing policies, and many others.

In addition to my broad experience in negotiating and drafting contracts and instruments, I have experience drafting and advocating on behalf of new county ordinances. I was intimately involved in drafting of Coconino County's ordinance restricting sales of vaping products to minors, as well as the County's continuing efforts to update and revise its health codes. I also consulted on the revisions and restyling of the County's zoning codes.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **Yes** If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

Arizona Dept. of Economic Security (1)
Coconino County Zoning Enforcement (1)
Sedona Planning & Zoning Commission (1)
Registrar of Contractors (1)

b. The approximate number of these matters in which you appeared as:

Sole Counsel: **3**

Chief Counsel: **N/A**

Associate Counsel: **1**

21. Have you handled any matters that have been arbitrated or mediated? **Yes**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **5**

Chief Counsel: **5**

Associate Counsel: **8**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

I. TLC PC GOLF, LLC v. COCONINO COUNTY
[Arizona Tax Court]

(1) *Date or period of proceedings*: **2017 – 2019**

(2) *Names, e-mails, telephone of counsel*:

a. Plaintiff's Counsel:

1. **James R. Nearhood, Esq. (lead counsel) (jrn@nearhoodlaw.com; (420) 998-3525)**

2. **Michael R. Fletcher, Esq. (co-counsel) (mrf@nearhoodlaw.com; (420) 998-3525)**

b. Defendant's Counsel:

1. **Myself**

2. **Yvonne Vieau, Esq. (yvieau@coconino.az.gov; (928) 679-8200)**

(3) *Summary of substance of case*:

Plaintiff owns a golf course in Flagstaff and sought to challenge the valuations assigned to its properties by the Coconino County Assessor for property tax purposes. Settlement required working closely with a specialized expert witness to understand these issues and to position the case for an acceptable settlement. Negotiations were guided by the reports and assessment of anticipated results at trial.

(4) *Statement of particular significance*:

During my entire 8+year tenure working for a private law firm, I had never practiced tax law and knew nothing about it. Upon joining the Coconino County Attorney's Office, I was assigned to represent both the County Assessor and the County Treasurer. I was required to quickly build expertise and understanding of tax law and tax practice, which is quite distinct from other practices. This case involved an appeal of the valuation of eleven separate component properties, against a property owner with a complex business,

management, and funding structure. Further, Plaintiff claimed declines in the popularity of golf (and resulting general declines in revenues) depressed the value of the properties.

This case demonstrates that I can quickly learn a new area of the law and leverage my other areas of understanding to successfully bring difficult cases to resolution.

II. CUSH, et al. v. RANDALL, et al.
[Superior Court]
STATE OF ARIZONA v. RANDALL
[Justice Court]

(1) *Date or period of proceedings*: **2012 – 2014**

(2) *Names, e-mails, telephone of counsel*:

a. Plaintiff's Counsel:

1. **Tony S. Cullum, Esq. (tony@tonycullumlaw.com; (928) 774-2565)**

b. Prosecutor in criminal case:

1. **Blaine Donovan, Esq. (bdonovan@coconino.az.gov: (928) 679-8268)**

c. Coconino County's Counsel:

1. **Timothy G. McNeel, Esq. (retired) tgmcneel2@gmail.com; (928) 679-0282**

d. Defendant's Counsel:

1. **Myself**

2. **Frederick M. "Fritz" Aspey, Esq. (faspey@awdlaw.com; (928) 774-1478)**

(3) *Summary of substance of case*:

In the Summer of 2010, Flagstaff experienced near record monsoon flooding (exacerbated by high-intensity fires in the mountain forests surrounding residential areas), which turned normally quiet arroyos into raging rivers. Our client, the defendant, protected his property from one such storm, when the natural and historic watercourse crossing the undeveloped parcel to the north of him

became clogged by a wall of mud and debris. The clogging of the waterway altered the normal flow-path of the water towards our client's house. To prevent flooding damage, our client entered his neighbors' parcel on an emergency basis to remove the obstruction to the natural watercourse, to restore the historic flow-path of water. The intense storms that followed significantly deepened the channel containing the watercourse, including over the undeveloped neighbors' parcel. The owner of the undeveloped parcel sued our client for property damage and civil trespass.

I had primary responsibility for all legal research and drafting of pleadings for this case. I also managed interactions with the engineering expert and the neutral mediator. Further, the plaintiffs filed a criminal complaint against our client for trespassing, to which I prepared a motion to dismiss.

The case was settled when we successfully moved for dismissal of the criminal case and then participated in a mediation, where the parties were able to make a deal for our client's acquisition of the plaintiffs' parcel. Finally, we negotiated a settlement with Coconino County, to obtain a notation on our client's records clearing him of any wrongdoing.

(4) *Statement of particular significance*:

This case involved the application and interplay of several complicated legal theories regarding real property and water law, including necessity and the common enemy doctrine. Successful defense of the case additionally demanded an understanding of sophisticated science and engineering principles at play, including hydrology and hydraulics in the context of steep mountain grades, in the aftermath of extremely high-intensity wildfires. Working closely with an expert engineer, I was able to develop a solid defense that created the leverage necessary to prompt settlement discussions. It also added the complication of dealing simultaneously with a related criminal case that created further pressures. Ultimately, settlement of the case depended upon successfully defending against the criminal charges, as well as developing a unique settlement arrangement using a mediator to help the parties appreciate their positions.

III. KENCHIOVA v. MARTINEZ, et al.
[Superior Court]
[EEOC]

(1) *Date or period of proceedings*: **2011 – 2012**

(2) *Names, e-mails, telephone of counsel*:

a. Plaintiff's Counsel:

1. Myself

2. Louis M. Diesel, Esq. (ldiesel@awdlaw.com; (928) 774-1478)

b. Defendant's Counsel:

1. Milton Hathaway, Esq. (mhathaway@mshwlaw.com; (928) 445-6860)

(3) *Summary of substance of case*:

Our client, the Plaintiff in this case, alleged severe sexual harassment by a supervisor at their job, and additionally claimed a hostile working environment, where they faced a company history of reporting and complaints by a category of workers being either minimized or ignored.

I had primary responsibility for this case from consultation to close. The client had experienced horrendous conduct at the hand of one of the Defendants, who was a person with power over the client's job. This Defendant supervisor threatened not only the client's job, but also actively endangered the client's relationship with their spouse. They were scared, hurt, and confused. The employer did not take the client's complaints seriously. I guided the client through the process of reporting the harasser's criminal activity and obtaining legal protective orders to end the abuse and secure the client and the client's family's personal safety. I then initiated both an administrative process with the Equal Employment Opportunity Commission, as well as a civil lawsuit. A global settlement was achieved via a mediation.

The case resulted in significant revisions to my client's employer's policies and practices with regard to harassment. Additionally, new trainings and new mechanisms for safe reporting were required and were ultimately instituted.

(4) *Statement of particular significance*:

The facts and circumstances behind this case were particularly heinous. There was a moral imperative in this case to help someone in dire need. The stakes were emotionally very high for my client and negotiations were difficult. There are times when one can see that the practice and application of the law makes a palpable difference. It was remarkable to me in how much the law

can impact the lives of citizens in very profound ways.

IV. RODRIGUEZ et al. v. WOCRA, LLC et al.
[Superior Court; Mandatory Arbitration]

(1) *Date or period of proceedings*: **2008 – 2011**

(2) *Names, e-mails, telephone of counsel*:

a. Plaintiff's Counsel:

1. **Lee M. Nation, Esq. (leenation@cox.net; telephone unknown)**

b. Co-Defendant:

1. **Kenneth H. Brendel, Esq. (kbrendel@mwswlaw.com; (928) 779-6951)**

c. Defendant:

1. **Myself**

2. **Donald H. Bayles, Jr., Esq. (dbayles@awdlaw.com; (928) 774-1478)**

(3) *Summary of substance of case*:

After a night of heavy drinking at multiple establishments, the Plaintiff came to my client's restaurant. While there, he became belligerent and was ultimately removed from the premises. Plaintiff was intent on resisting removal, such that it became necessary to restrain him. Both restaurant staff and a city police officer worked together to successfully restrain Plaintiff and remove him from the restaurant. Plaintiff claimed that he was injured as a result of the restraining and sought treatment at a hospital. He sued my client for its employee's actions in removing him from its premises. My co-counsel and I defended a restaurant against a personal injury claim filed by this patron. I was responsible for drafting pleadings, conducting depositions, and also acted as primary counsel during the following arbitration proceeding.

During mandatory arbitration, the main issue was application of an affirmative defense (found in A.R.S. § 12-711), which provides that if a plaintiff is found to be under the influence of intoxicating liquor and as a result of that influence was at least fifty percent responsible for the event that caused the plaintiff's harm, the defendant may be found not liable at all, even if the defendant may have been partially at fault. I developed solid evidence establishing

that the Plaintiff was intoxicated and had acted irresponsibly and belligerently. The assigned arbitrator found that the Plaintiff was more than 80% responsible for his own injuries. However, the arbitrator chose to ignore the statutory defense and nevertheless awarded Plaintiff damages. My client chose to settle, rather than proceed with appeal of the relatively modest arbitration award.

(4) *Statement of particular significance*:

This case is significant to me because it illustrated to me in a very concrete experience that it is possible for an attorney to be right on the law, to establish all of the necessary facts, to do everything correctly, and still not be successful in achieving their intended goal.

V. KNOLES v. KNOLES
[No Court Case Filed]

(1) *Date or period of proceedings*: **2008 – 2011**

(2) *Names, e-mails, telephone of counsel*:

a. Plaintiff Knoles:

1. **Myself**

2. **Frederick M. "Fritz" Aspey (faspey@awdlaw.com; (928) 774-1478)**

b. Defendant Knoles:

1. **Robert L. Miller, Esq. (ret.) (bobebond23@gmail.com; (928) 606-1412)Myself**

(3) *Summary of substance of case*:

This case involved a dispute between family members regarding the continued management and disposition of a large estate, which included multiple holding companies and properties. The parties had lost confidence in each other as to management, and their ability to cooperate had largely disappeared. The Defendant had historically exercised primary management authority and had acted unilaterally, until our client objected. Our client hired us to assert grievances and represent them as Plaintiff. I acted as lead counsel to successfully negotiate with opposing counsel to dissolve the joint companies and allocate the assets.

(4) *Statement of particular significance*:

This case is significant, because it demonstrates my ability to use creative problem-solving to achieve resolution of disputes. To overcome the antipathy of the parties and arrive at a productive conclusion of the dispute, they had to be separated and allowed to go their separate ways. The complication came in the unique properties owned and managed by the family jointly, as well as the need to preserve a trust for the continued care of an elderly parent. The properties could not be immediately or easily liquidated, but could not be jointly managed. To accomplish the goal of settling without litigation, I developed a creative means of dissolving the companies and allocating the assets. I did so via use of transfer agreements with safeguards (such as rights of first refusal), to structure a disposition that was acceptable to both sides. Documentation of the deal required drafting a lengthy and complicated settlement agreement, supported by numerous transfer documents. I worked closely with opposing counsel to do so. I worked closely with opposing counsel to do so.

23. Have you represented clients in litigation in Federal or state trial courts? **Yes** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **5**

State Courts of Record: **150+**

Municipal/Justice Courts: **20**

Tribal Courts: **10**

***The above represents an estimation. Having transitioned away from private practice to government practice nearly five years ago, I no longer have full access to my old case files and cannot verify exact numbers.**

The approximate percentage of those cases which have been:

Civil: **99%**

Criminal: **1%**

The approximate number of those cases in which you were:

Sole Counsel: **50**

Chief Counsel: **90+**

Associate Counsel: **40**

***The above represents an estimation. Having transitioned away from private practice to government practice nearly five years ago, I no longer have full access to my old case files and cannot verify exact numbers.**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: **20%**

You argued a motion described above **10%**

You made a contested court appearance (other than as set forth in the above response) **20%**

You negotiated a settlement: **90%**

The court rendered judgment after trial: **2%**

A jury rendered a verdict: **<1%**

***The above represents an estimation. Having transitioned away from private practice to government practice nearly five years ago, I no longer have full access to my old case files and cannot verify exact percentages.**

The number of cases you have taken to trial:

Limited jurisdiction court **7**

Superior court **4**

Federal district court **0**

Jury **1**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

***The above represents an estimation. Having transitioned away from private practice to government practice nearly five years ago, I no longer have full access to my old case files and cannot verify exact numbers.**

24. Have you practiced in the Federal or state appellate courts? **Yes** If so, state:

The approximate number of your appeals which have been:

Civil: **16**

Criminal: **0**

Other: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: **16**

Personally in oral argument: **4**

25. Have you served as a judicial law clerk or staff attorney to a court? **No** If so, identify the court, judge, and the dates of service and describe your role.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

I. STATE FARM MUTUAL AUTO et al. v. MICHAEL SLAYTON et al.

(1) *Date or period of proceedings*: **2009 – 2011**

(2) *Name of court or agency & Name of judge or officer who heard case*:

a. Maricopa County Superior Court: CV2009-008666, before Hon. John C. Rea

b. Court of Appeals, Div. I: CA-CV 10-0711, before Hon. John C. Gemmill, Hon. Diane M. Johnsen, and Hon. Patricia A. Orozco

(3) *Names, e-mails, telephone of counsel*:

a. Attorneys for Plaintiffs/Appellants Michael & Kathleen Slayton:

1. Reid Garrey, Esq. (rgarrey@gwhplaw.com; (480) 483-9700)

2. Shawna M. Woner, Esq. (swoner@gwhplaw.com; (480) 483-

9700)

b. Attorneys for Defendant/Appellee State Farm Mutual Automobile Insurance Co.**:**

1. **Ronald W. Collett, Esq. (Deceased)**

2. **Lori Voepel, Esq. (lvoepel@jshfirm.com; (602) 263-7312)**

c. Attorneys for Defendant/Appellee Great Northwest Insurance Co.**:**

1. **Myself**

2. **Louis M. Diesel, Esq. (ldiesel@awdlaw.com; (928) 774-1478)**

3. **Donald H. Bayles Jr, Esq. (dbayles@awdlaw.com; (928) 774-1478)**

(4) *Summary of substance of case***:**

This case involved claims by two parents with regard to an ATV accident that led to the death of the Plaintiffs' son. They were not present to witness the accident, and only came across the scene after their son had already passed away. The Plaintiffs asserted a claim under available insurance policies for wrongful death of their son. Policy limits for individual coverage were immediately paid out for their wrongful death claim. However, the Plaintiffs additionally argued that the insurance companies should pay further "per incident" aggregate policy limits, because of asserted separate claims for negligent infliction of emotional distress and intentional infliction of emotional distress that were personal to them.

The core dispute in this litigation concerned the Plaintiffs' challenge of an element of a long-standing cause of action. Under Arizona law, in order to state claim for negligent infliction of emotional distress, a plaintiff must have been close enough to a negligent defendant, such that they were themselves exposed to unreasonable risk of bodily harm by the defendant's conduct. This is what is known as the "zone-of-danger" requirement. The Plaintiffs argued that this requirement was outdated, had no logical purpose, and only served to block just claims.

I had responsibility for all legal research, drafting, and argument for this case at all levels. I obtained summary judgment in our client's favor before the trial court, and then further successfully defended that judgment before the court of appeals. In doing so, I argued that

the zone-of-danger requirement is a necessary check to prevent unlimited liability and effectively links recovery with negligent action. I also digested, summarized and analyzed the law of negligent infliction of emotional distress in more than 30 other states, to counter Plaintiffs' argument that there was a growing trend in other states pointing towards revoking of the zone-of-danger requirement.

(5) *Statement of particular significance*:

As demonstrated in the excerpts from my response brief (attached to this application under "Attachment D" as one of my writing samples), this case required me to go beyond simply relying upon *stare decisis*. To defend my client's position, I examined and argued the very policies and goals grounding Arizona law, so that I could defend it thoroughly. The case also required me, in a short period of time, to conduct a broad survey of the relevant law regarding negligent infliction of emotional distress throughout the United States, and then digest all of that information succinctly and persuasively to refute the Plaintiffs' position. This demonstrates my ability to process, analyze, and understand large amounts of information and then organize and relate it persuasively.

II. In re RADER

(1) *Date or period of proceedings*: **2010 – 2013**

(2) *Name of court or agency & Name of judge or officer who heard case*:

a. Coconino County Superior Court: CV2010-00289, before Hon. Charles Adams

b. U.S. Bankruptcy Court, Dist. of Ariz.: 10-14477, before Hon. Redfield T. Baum Sr.

c. U.S. Bankruptcy Appellate Panel of the Ninth Circuit: AZ-12-1241, before Hon. Sandra R. Klein, Hon. Jim D. Pappas, and Hon. Bruce A. Markell

(3) *Names, e-mails, telephone of counsel*:

a. Attorneys for Appellants Marshall L. Rader; Barbara J. Rader (debtors); William E. Pierce, Chp. 7 Trustee:

1. Terry A. Dake, Esq. (tdake@cox.net; (602) 710-1005)

b. Attorneys for Defendants/Appellees Robert G. Carson and Sandra J. Carson, trustees of the R&S Carson Family Trust**:**

1. **Myself**

2. **Diana J. Elston (delston@jshfirm.com; (602) 263-4413)**

(4) *Summary of substance of case***:**

The debtors in this case purchased a trading post business from my clients under a seller-carry financing arrangement. The deal included a purchase of the real property where the trading post was located, as well as all associated business personal property, including displays, storage lockers, equipment, and inventory. The sale was secured by a deed of trust against the real property only. No UCC-1 security agreement or registration had been obtained to secure the business personal property.

Several years later, the debtors defaulted on their payments, and my clients attempted to exercise their rights to collect on their debt. However, the debtors ultimately declared bankruptcy before my clients could reclaim the business. The automatic bankruptcy stay prevented any further legal action to enforce my clients' rights regarding the debt. I obtained permission from the bankruptcy court for my clients to proceed with a trustee's sale of the real property. After the sale was completed, there was a sizeable deficiency remaining due and owing to my clients. The difference between the value of the real property and the debt reflected the prior sale of the business personal property, which had not been protected by a security interest. Rather than seek a state court lawsuit against the debtors, I then filed a claim with the bankruptcy court for the payment of the remainder of the debt owed to them by the debtors.

The Chapter 7 Bankruptcy Trustee eventually objected to my clients' claim for the remaining debt. He argued that my clients were precluded from receiving any further payment on their debt, because they did not sue the debtors in state court. The Trustee's argument was based upon an Arizona state statute regarding deficiencies after a real property foreclosure. In a motion written together with my co-counsel, I maintained that bankruptcy law controlled over state law under these circumstances, and therefore, the automatic bankruptcy stay prevented my clients from suing the debtors in state court and the remaining debt was required to be resolved by the bankruptcy court. The Bankruptcy Court ruled in my clients' favor, agreeing that bankruptcy law preempted the Arizona requirement. The Trustee appealed to the 9th Circuit Court of Appeals Bankruptcy Appellate Panel.

On appeal, I wrote the response brief and argued the case before the Panel. I distinguished the cases relied upon by the Trustee on appeal as inapplicable. In so doing, I highlighted differences in foreclosure processes between other states and Arizona, and further argued that compliance with the Arizona state statute would also have been futile, because of the entry of a discharge before the deadline for filing that lawsuit passed. The Panel agreed and affirmed the judgment below.

(5) *Statement of particular significance*:

This case is significant, because it was the first that I briefed and argued that resulted in a reported opinion, *In re Rader*, 488 B.R. 406 (B.A.P. 9th Cir. 2013). I was able to successfully clarify for creditors that there is no need to seek or file a separate deficiency action in state court, in order to preserve a claim in bankruptcy for that deficiency.

III. STATE FARM FIRE AND CASUALTY CO. v. SAPP et al.

(1) *Date or period of proceedings*: **2012 – 2015**

(2) *Name of court or agency & Name of judge or officer who heard case*:

a. Mohave County Superior Court: CV2012-00312, before Hon. Charles W. Gurtler

b. Court of Appeals, Div. I: CA-CV 13-0623, before

1. **Hon. Patricia A. Orozco**
2. **Hon. Randall M. Howe**
3. **Hon. Maurice Portley**

(3) *Names, e-mails, telephone of counsel*:

a. Attorneys for Plaintiff/Appellant State Farm Fire and Casualty Co.:

1. **Joel D. DeCiancio, Esq. (Email unknown; (602) 889-0832)**

2. **Christopher Robbins, Esq. (Email unknown; (602) 889-2440)**

b. Attorneys for Defendant/Appellee Alicia Fisk:

1. **Myself**

2. **Louis M. Diesel, Esq. (ldiesel@awdlaw.com; (928) 774-1478)**

3. **Bruce E. Colodny, Esq. (CA attorney *pro hac vice*) (Bruce.colodny@verizon.net; (909) 862-3113)**

(4) *Summary of substance of case*:

Our client, Alicia Fisk, was living together with her fiancé in her father, Robert Hartwig's home and driving his car. Knowing that Ms. Fisk's fiancé would be driving his car, and having experienced a serious accident himself that had resulted in major medical bills, Mr. Hartwig discussed with his insurance agent about how to guard against similar liabilities. Mr. Hartwig asked for insurance that would provide more coverage for those same people using his house and his car, including Ms. Fisk and her fiancé. Hearing these requests, his insurance agent recommended an umbrella insurance policy, which Mr. Hartwig then purchased from State Farm. Mr. Hartwig was given a copy of the declarations page, but he stated that he was never sent a copy of the full written policy and had never read it.

Subsequently in 2012, Ms. Fisk was involved in a one-car accident, while her fiancé was driving. She sustained extremely severe injuries, the damages for which greatly exceeded her father's auto insurance policy. However, when Ms. Fisk made a claim under her father's umbrella policy, State Farm declined coverage. State Farm brought a declaratory judgment lawsuit against Ms. Fisk and her fiancé, in order to resolve the question of whether it would have to provide coverage.

I was responsible for all research and drafting. The parties submitted cross-motions for summary judgment. The main issue for resolution was interpretation and application of Arizona law on the "reasonable expectations doctrine." State Farm argued that the written boilerplate language of the umbrella policy specifically excluded coverage, because Ms. Fisk's fiancé was not a "relative" of Mr. Hartwig, as defined by that boilerplate. I countered that State Farm could not use boilerplate language from a written policy that was never sent to Mr. Hartwig, and which he had never read, to deny coverage that its own agent stated would exist to the same extent as his auto policy. The trial court ruled that Mr. Hartwig's reasonable expectations that Ms. Fisk's fiancé would be covered controlled over the express language of the boilerplate to the contrary. State Farm appealed. The Court affirmed the judgment.

(5) *Statement of particular significance*:

This case was my final appeal while in private practice. On appeal, I was responsible for researching and drafting our client's appeal brief. The case is significant to me, because I was required to

counter a prior federal court decision that interpreted Arizona law contrary to our position. The federal court case created a bright line restriction that the reasonable expectations doctrine could not be applied to expand coverage that was not already granted by the written documents. Instead, according to this interpretation, the doctrine could only be used to eliminate an inconsistent term. As show by the excerpts from my response brief for this case (attached to this application under "Attachment E" as one of my writing samples), I successfully argued that this restrictive interpretation of the doctrine was inconsistent with Arizona law.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

From 2012 to 2015, I participated in Coconino County Superior Court's arbitration program as an arbitrator. During my participation, I was assigned only once by the Coconino County Superior Court as arbitrator for a mandatory court-ordered arbitration. This assignment was for a civil personal injury case. As arbitrator, I was responsible for resolving discovery disputes and entering procedural orders in the lead-up to an arbitration hearing. I also conducted a full arbitration hearing, where I resolved evidentiary objections, received witness testimony, and heard argument from the parties. Finally, it was my responsibility to review all documents, testimony, and expert witness reports to make findings of fact and render a decision.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

I. PILEGGI v. BURLY FISH TATTOO

(1) *Date or period of proceedings*: **Aug. 2015 – Jun. 2017 with arbitration dates Dec. 2015 – Jun. 2016**

(2) *Name of court or agency & Name of judge or officer who heard case*: **Coconino County Superior Court: CV2015-00445 –Arbitration program**

(3) *Counsel for the Parties:*

a. Plaintiff's Counsel**:**

1. Mark A. Kamin, Esq. (mkamin@goldbergandosborne.com; (928) 773-9599)

b. Defendant's Counsel**:**

1. Kenneth Brendel, Esq. (kbrendel@mwswlaw.com; (928) 779-6951)

(4) *Summary of substance of case***:**

This was a personal injury case involving a claim against a tattooing business by a patron whose tattoo had become infected. The case required a determination of whether the defendant tattooing business had caused the plaintiff's infection by its negligence. I presided over the entire arbitration, including scheduling, resolution of discovery disputes, motion practice, and a full arbitration hearing, which resulted in an award. The award was later appealed to the Superior Court.

(5) *Statement of particular significance***:**

This case was significant as my first and only experience, where I served in an adjudicatory capacity. The case required me to be decisive and make sound, timely decisions, to fit the abbreviated schedule accompanying a mandatory arbitration.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

In addition to extensive Bar service (discussed more below), I have also served as a trained and sworn Coconino County Election Official in four years of general elections and primaries. My duty posting was to Page, Arizona. In this capacity, I prepared the voting location, including setting up voting machines and stations, ensuring access requirements, verifying identifications, checking in voters, safeguarding and delivering final ballots and results, and also assisting with supervision for various other jobs and positions during elections.

Further, I served in the Volunteer Lawyers' Program, providing free legal advice on landlord/tenant and other real estate matters to low-income individuals.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **Yes** If so, give details, including dates.

Teaching Assistant,

- **Brigham Young University: Prof. Ralph C. Hancock, PhD**
- **Years: Jan. 2003 – May 2003**
- **I assisted with grading student assignments, conducted review sessions, and gave supplemental lectures in political philosophy for two semesters.**

Scenic Carpenter,

- **Brigham Young University, Theater Dept.**
- **Years: Sept. 2000 – approximately Dec. 2002**
- **I constructed sets and scenery for university theater and musical productions, as well as for university special events.**

Construction Laborer

- **Interwest Construction**
- **Years: Jun. 2000 – Aug. 2000**
- **I performed manual labor in various projects and worked on framing of residential construction for a private California construction contractor.**

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No**

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes**

33. Have you paid all state, federal and local taxes when due? **Yes**

34. Are there currently any judgments or tax liens outstanding against you? **No**

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No**

36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No**

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No**

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No**

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No**

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No**

    If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition. **Not Applicable**

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not Applicable**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **Not Applicable**

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **Not Applicable**

44. List and describe any sanctions imposed upon you by any court. **Not Applicable**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No**

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No**

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No**

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No**

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No**

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes** If so, list with the citations and dates.

- Brian Y. Furuya, *Getting It Right by Getting It Wrong: How the Supreme Court Helped Healthcare Reform by Incorrectly Applying the Standard of Review in Pharmaceutical Research and Manufacturers of America v. Walsh*, 20 BYU J. PUB. L. 549 (2006).
- Brian Y. Furuya, *Commercial Leases: Five Things Every Business Tenant Should Know*, FLAGSTAFF BUSINESS NEWS, May 24, 2015.
- Brian Y. Furuya, *Liberty and Justice for All*, ARIZONA ATTORNEY MAG., Sept. 2019.
- Brian Y. Furuya, *Treats Are the Trick: Life-Balance in Law Practice*, ARIZONA ATTORNEY MAG., Oct. 2019.
- Brian Y. Furuya, *First Things First*, ARIZONA ATTORNEY MAG., Nov. 2019.
- Brian Y. Furuya, *Gratitude and Holiday Mental Health*, ARIZONA ATTORNEY MAG., Dec. 2019.
- Brian Y. Furuya, *Clear Vision for the Future*, ARIZONA ATTORNEY MAG., Jan. 2020.
- Brian Y. Furuya, *Mindfulness: Take It to Heart*, ARIZONA ATTORNEY MAG., Feb. 2020.
- Brian Y. Furuya, *Of Proverbs & Starfish*, ARIZONA ATTORNEY MAG., Mar. 2020.
- Brian Y. Furuya, *Renewed Commitment*, ARIZONA ATTORNEY MAG., Apr. 2020.
- Brian Y. Furuya, *Beautifully Broken*, ARIZONA ATTORNEY MAG., May 2020.
- Brian Y. Furuya, *Who We Are*, ARIZONA ATTORNEY MAG., Jun. 2020.

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes**

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes** If so, describe.

J. Reuben Clark Law School, Legal Interviewing & Counseling class

- **I worked as adjunct faculty teaching law students legal interviewing and counseling theory and techniques for nearly three years.**

Ethics CLE—Navajo Nation Bar Association

- **I prepared a presentation for, and instructed, a group of approximately 30+ attorneys on the Navajo Nation rules of professional conduct in December of 2015**

State Bar of Arizona History and Professionalism

- **I have presented CLEs at various locations, primarily speaking on the role and history of the State Bar of Arizona, including current developments that impact the practice of law and the subject of professionalism**

53. List memberships and activities in professional organizations, including offices held and dates.

- **State Bar of Arizona (member 2007 to Present)**
- **Navajo Nation Bar Association (member 2008 to Present)**
- **Coconino County Bar Association (member 2007 to Present)**
- **J. Reuben Clark Law Society (member 2004 to Present)**
- **Arizona Asian American Bar Association (member 2019 to Present)**
- **National Asian Pacific American Bar Association (member 2019 to Present)**
- **American Bar Association (member 2004 to 2010)**
  - **Bar Leadership Institute (2017; 2018)**
- **National Conference of Bar Presidents (member 2018 to 2020)**
- **Arizona Civil Deputy County Attorneys Association (member 2016 – Present)**

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes**

In addition to the leadership offices listed below, I have also served on the following State Bar of Arizona committees:

- **Executive Council (2016 – 2020)**
- **Strategic Planning Committee (2018 – 2020)**
- **Finance & Audit Committee (2017 – 2018)**
- **Awards Committee (2016; 2018)**
- **Diversity & Inclusion Committee (2014)**
- **2020 State Bar Annual Conference Planning Work Group (2019)**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

- **State Bar of Arizona (member 2007 to Present)**
  - **President; (2019 – 2020)**
  - **President Elect; (2018 – 2019)**
  - **Vice President; (2017 – 2018)**
  - **Secretary/Treasurer; (2016 – 2017)**
  - **Board of Governors; District 1 Elected Rep.; (2014 – 2020)**
  - **Board of Governors; Board Advisor (2020 – Present)**
  - **Chair, Finance & Audit Committee (2018)**
  - **Chair, CEO Search & Hiring Committee (2018)**
  - **Chair, Awards Committee (2018)**

- **Coconino County Bar Association (member 2007 to Present)**
  - **President; (2013)**
  - **Vice President; (2012)**
  - **Treasurer; (2011)**
  - **Secretary; (2010)**

- **Volunteer Lawyers Program (2008 – 2009)**
  - **I provided free legal consultations and advice to low-income individuals on real estate matters, but primarily in the area of landlord/tenant disputes.**

- **Navajo Nation Pro Bono Assignments (2008 – Present)**
  - **In conjunction with maintaining licensure to practice law in courts of the Navajo Nation, I have provided pro bono representation for low-income individuals involved in civil disputes within the Navajo Nation on a variety of matters.**

54. Describe the nature and dates of any relevant community or public service you have performed.

I perform chaplain's services at the Flagstaff Medical Center hospital for members of the Church of Jesus Christ of Latter-day Saints. I have also volunteered for a variety of community service projects over the years, including serving meals at the Flagstaff Family Food Center, providing assistance and cleanup service for the community after multiple disaster events (2010 Schultz Flood, 2010 Bellemont Tornado), and organizing and participating in large scale community trash and graffiti cleanup projects.

In 2013, I participated in the Flagstaff Leadership Program, a training and service program for leaders in the community of Flagstaff. During the

program, I learned about all aspects of Flagstaff and Northern Arizona, so that I could be a more effective leader in the community. We also completed a service project, performing significant rehabilitations and improvements to Bushmaster Park in Flagstaff. I also participated in organizing and administering the program for the next class in 2014.

In 2008, I served on two different Citizen Advisory Groups for the City of Flagstaff, including as Chair of the Business & Economic Development Citizen Advisory Group, where I assisted in an extensive revision and reorganization of its zoning code.

I have also performed public service as an election official in primary and general elections from 2016 through 2018, as discussed previously in section 29 above.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

- **SuperLawyers Rising Star, Top Rated Business & Corporate Attorney, 2015.**
- **The National Trial Lawyers, Top 40 Under 40 (2012; 2013)**
- **Flagstaff Leadership Program, Graduate Class of 2013**
- **National Association of Counties, 2017 Achievement Award for Rural County Outreach to Special District Partners for Annual Compliance and Service Improvement**
- **Coconino County Public Service Recognition Week Certificate, For Work in Training Special Districts, 2016**
- **Coconino County Public Service Recognition Week Certificate, For Work in Resolving Substantial Long-Standing Personal Property Tax Delinquencies, 2017**
- **Coconino County Public Service Recognition Week Certificate, For Work on Revisions to County Health Code to Prevent Youth Access to Vaping Products, 2017**
- **Coconino County Public Service Recognition Week Certificate, For Work in Reorganizing the County's Civil Asset Forfeiture Practice, 2018**
- **Coconino County Public Service Recognition Week Certificate, For Excellence in Department Representation, 2018**

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

No executive level elected or appointed public offices, but I have worked in the following public positions:

Coconino County Election Official (2016 – 2019)

Deputy County Attorney (2016 – Present)

Have you ever been removed or resigned from office before your term expired? **No**

Have you voted in all general elections held during the last 10 years? **Yes**

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

Although born and raised in Los Angeles County, I have been privileged to live and work in Flagstaff, Arizona for the past 13 years. I have loved being so near to nature and the lovely people of Coconino County. Living here has given me great insight into life in a more rural area. I enjoy nature walks and the quiet beauty of the forest. I also love experiencing the diverse cultures present around us. A treasured memory involves an invitation for my family and I to attend the traditional Bean Dance at the Hopi village of Hotevilla.

I am a man a faith and find great strength and instruction through my faith community. I attend church weekly and have held a variety of positions in our local congregation, including as a children's teacher and various leadership roles.

I also enjoy cooking, reading, and spending quality time with family. I have practiced American Kenpo Karate for a number of years, having earned my 1st degree black belt. I am also a student of history and philosophy.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes**

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

I am of Japanese heritage. My father was born in the Tule Lake Japanese Internment Camp at the close of World War II, and grew up in post-war California. While in my first year of law school, we learned about the

landmark case of *Korematsu v. United States* [323 U.S. 214 (1944)], upholding the exclusion and imprisonment of my family. After the lecture, my professor encouraged me to interview my grandmother about her experiences surrounding the internment. I am grateful that I did so. I have spent a great deal of time reflecting on that chapter of our history. It has given me a much greater appreciation for the rights that we enjoy under both the U.S. and Arizona Constitutions, but also helped me see how delicate those rights can be.

I am also a person of faith, but came to my present beliefs after first being an atheist. I then spent two years in the Eastern part of Germany (1998 – 2000) performing full-time service as a missionary for the Church of Jesus Christ of Latter-day Saints, where I listened to (and came to respect and love) others from many different walks of life. I believe this has taught me to be respectful of others, to listen patiently, and recognize the value of diversity. Living for an extended period of time in a foreign country, and more specifically in what was formerly the Eastern-bloc German Democratic Republic, also helped me to more fully appreciate my own country and its system of government.

Please see "Attachment B" for further details.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

In addition to being licensed to practice law in Arizona, I have also been licensed to practice law on the Navajo Nation since 2008, where I handled a variety of cases, including mental health issues, custody issues, and others, on a *pro bono* basis. My work on the Nation has given me a much broader perspective and appreciation for issues involving access to justice and related matters.

I have served as a leader with the State Bar of Arizona, including as President, and have worked together with attorneys throughout the state and the Courts to develop policies to promote the rule of law and improve access to justice. I believe this shows a commitment to service to Arizona's legal community and its citizens, as well as the skills to engage with attorneys and the public at all levels.

Further, since 2018, I have been working with members of the Arizona Asian American Bar Association ("AAABA") and others to advocate for Arizona's official recognition of the Japanese Internment and the contributions of those Japanese Americans who, despite their imprisonment, continue to contribute greatly to our country.

I also enjoy teaching, and have presented at numerous conferences and CLE meetings, usually teaching on the topic of ethics and professionalism.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes**

62. Attach a brief statement explaining why you are seeking this position.

Please see "Attachment C."

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see: "Attachment D"—Professional Writing Sample 1
"Attachment E"—Professional Writing Sample 2

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see: "Attachment F"—Arbitrator Writing Sample 1
"Attachment G"—Arbitrator Writing Sample 2

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews. **Not Applicable**

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ATTACHMENT A

Question 15: LAW PARTNERS & ASSOCIATES (Last 5 years: 2015 – 2020)

ATTACHMENT A

ATTACHMENT A—
Question 15: Law Partners & Associates (Last 5 years: 2015 – 2020)

Coconino County Attorney's Office (2016 – 2020)

David W. Rozema
Michael J. Lessler
William P. Ring
Jane Nicoletti-Jones
Ammon Barker
Nicholas Buzan
Ashley DeBoard
Blaine Donovan
Daniel Garcia
Mark Huston
Angela Kircher
Stacy Krueger
Aaron Lumpkin
Timothy G. McNeel
Paul Rubin
Eric Ruchensky
Serena Serassio
Bryan Shea
Marc Stanley
Richard Vihel
Rose Winkeler
Logan Rogers
Michael Tunik
Kathryn Fuller
Yvonne Vieau
MJ Vuinovich
Paul Garns
Daniel Noble
Prova Ahmed
Erin Anding
Kory Koerperich
Keatan Williams
Marc Byrnes

Aspey, Watkins & Diesel, P.L.L.C. (2014 – 2015)

Frederick M. "Fritz" Aspey
Harold L. Watkins
Louis M. Diesel
Whitney Cunningham
Donald H. Bayles, Jr.
Stephen A. Thompson
John W. Carlson
Eddie Walneck
Wendy A. Edwards
Staci Foulks
Kathryn G. Mahady
Zachary J. Markham
Jennifer Mott
Monica M. Pertea
Staci L. Vierthaler

ATTACHMENT B

Question 59: FURTHER INFORMATION ON HERITAGE & BACKGROUND

ATTACHMENT B

ATTACHMENT B—
Question 59: Further Information on Heritage & Background
Tim Eigo, Article from Arizona Attorney Magazine, July/August 2019 Issue (pp. 32-36), used with permission.

BY TIM EIGO
PHOTO BY JOHN HALL

Reframing the Narrative

New Bar President Brian Furuya

Leo Tolstoy and the great American Western may never have collaborated, but they agree on one thing. Nearly all riveting tales are grounded in this theme: a stranger comes to town.

Strangers, of course, may have no more wisdom than the townsfolk they meet. Both can see and act, change and be changed. But the outsider's status brings opportunities and perspective on the town's troubles. To him, intractable problems may appear soluble. And the stranger may be the most effective mediator when longtime disagreements surface.

Brian Furuya, it could be argued, is hardly an outsider. He's been a respected Flagstaff attorney since 2007—and has just become the newest President of the State Bar of Arizona. Just 40 years young, he's a leader in the multiple communities he inhabits. He's worked at one of the state's most respected firms, and now serves as a deputy county attorney for Coconino County.

You—and Tolstoy—might say that sounds pretty insider.

But beyond the resume, Furuya has straddled different worlds—familial, cultural and religious—his entire life. In temperament and experience, his outlook is marked by those interrelationships and intersections, and the discovery and self-discovery they require.

That may not make him the outsider in a Hollywood Western. But mediating those experiences has honed his ability to analyze, listen and reinvent—ideal skills for a new bar president.

Among the many towns that have affected and transformed Furuya, the most significant may be a California community he himself never lived in.

Tule Lake

The border region between California and Oregon is one of the country's most beautiful. It's a remarkable place to visit—except in the 1940s for Japanese Americans who were imprisoned in an infamous compound, based on their race and ethnicity.

In the early 1940s, Furuya's grandparents were in their early 20s, married, and living in Southern California. On the day of the Pearl Harbor attack, his grandfather was tending a garden when his client heard the news on the radio, rushed outside, and ordered his longtime gardener to leave and never return. Soon thereafter, President Franklin Roosevelt signed Executive Order 9066, permitting the incarceration of people of Japanese American descent.

Initially processed through the makeshift staging area at the Santa Anita Racetrack, the American-born couple was housed in a horse stable. They were then transferred to the first official prison, Manzanar. But then they were moved to Tule Lake Segregation Center.

Tule Lake was one of the 10 American concentration camps built to imprison approximately 120,000 Japanese American people forcibly removed from West Coast states during World War II. Recognized today as a tragic blot on the U.S. civil rights record, the prisons held families and individuals, nearly all of whom were American citizens.

Amongst the prisons, Tule Lake has special notoriety as the penitentiary for those colloquially deemed "No-Nos." When a poorly conceived loyalty questionnaire was administered in 1943 to all imprisoned, some refused to give an unqualified "yes" to confusing questions asking if they would swear allegiance to the U.S.—and they were deemed disloyal. Those individuals—including Furuya's grandfather—and their families were transported to Tule Lake. It was the only center designed as a maximum-security prison, and is often considered the most controversial.

That's where Furuya's father was born in 1945—the year the war ended. But they remained living in a tarpaper and plywood shack for another year due to a tuberculosis outbreak that infected his grandfather.

"So that's where my story begins," Furuya says. "My story begins with my father."

He's certainly not the first to locate his own origin decades before he was born. But for Furuya—troubled by today's access to justice gap and galvanized by legal inequities—that's fitting. The discrimination his ancestors faced—and the resolve they emerged with—are defining elements of Furuya's personal narrative.

When the young family returned to Los Angeles, Furuya says, "the community really didn't want them back, and so they began to carve a life out for themselves. Eventually my grandfather's business took off again, and he was able to buy a home in the 50s in Pasadena."

Years later in law school, after he learned the seminal *Korematsu* case, Furuya interviewed his grandmother about her wartime experience. She most recalled how scared she was after Pearl Harbor. Her husband's clients abandoned him, they were running out of food and money, and everyone around them was hostile. The racism surrounding them grew so dire, she was almost relieved to be imprisoned.

When he was interviewed by Brian about postwar life, Furuya's father Yoshio described his own life as a young man in


Brian Furuya at the
Coconino County
Courthouse, Flagstaff.
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1950s California.

"He told me, 'It was tough because you had to be more American than the Americans.' I asked what that means, and he said, 'If everyone was in Boy Scouts, you had to be an Eagle Scout. If everyone played baseball, you had to letter and be varsity.'"

When the Vietnam War started, Yoshio enlisted—and eventually did two tours of duty. He became the first in his family to attend college, ultimately earning dual master's degrees—in audiology and speech pathology.

Smiling, Furuya reports that his father is also a 10th-degree black belt in American Kenpo karate.

"I am prodigiously proud of my father."

Magdeburg

Born and raised in Pasadena, Furuya admits his wasn't a particularly religious household. In fact, when he was a teenager, he decided he was an atheist. But that changed when he was 17. That's when he converted to the Church of Jesus Christ of Latter-Day Saints.

Furuya today is a religious man, while the family he was raised in is decidedly *not* LDS—Furuya the outsider smiles when he says they are "very still not" LDS. His parents' easygoing manner has taken root in him. He says his mother and father are "equally uncommitted to any" religion, "but they are very open-minded about religious stuff."

Furuya's grandmother and father, Tule Lake.

Like his father's journey, Furuya marvels at his mother's path and what may flow from adversity.

As a young girl, "she wound up in California by way of kidnapping," he says, explaining that her own mother fled a bad Illinois marriage with her daughter in the middle of the night. But she discovered it was difficult to raise a child as a single mother in the 1950s—and gave her daughter up to foster care, initially to a Protestant minister, and then to one of the congregants.

That congregant "turned out to be the grandmother I always knew."

But family matters are rarely lived in a straight line, and his mother's mother returned to try to raise her daughter for a few more years, only to leave her life once again. Ultimately, the foster grandmother made the adoption permanent. Still, the tumultuous upbringing had its effect, and the girl moved out at 16, eventually marrying Yoshio.

Furuya says his mother is today "a very live-and-let-live kind of person—which is beautiful."

His LDS mission was in Germany, and a listener wonders if that's due to his mother's Austrian background. Furuya says he had requested Japan as his posting, but his years of high school German may have had something to do with it.

He served in an area around Leipzig, close to the Czech border. Ten years after the fall of the Berlin Wall, he was stationed in Magdeburg, the capital city of Saxony–Anhalt. He says that even with the high school German grammar, he still struggled with comprehension months into his posting. But 21 years later, he recalls his moment of awakening.

"It was hot, it was summer, and we were talking to a lady in her apartment. Up to that point, I had understood exactly zero of anything anyone said."

"I remember my mission companion was talking to her, and she was going on with her answers. I was just kind of tired, and I started feeling faint. But the experience can be described as with old knob radios—you're turning and it's all static, and then you come across a station, and I just suddenly understood what she said. It was a definitive moment."

"I was just so proud of myself that I actually could understand some of what that lady was saying."

Which was what?

"Which was, generally, 'I'm not interested.'"

Nonetheless, Furuya says, that moment of true communication—made possible by a mixture of patience and education—made a lifelong impression on the young man. And it affected how he believes we must be patient and work hard to understand others.

> As a leader, Furuya urges those around him to "put down the shield, take off the mask."

Flagstaff

Except for the bar exam in Tucson and Bar meetings in Phoenix, Arizona for Furuya and his family has always been Flagstaff.

"I have absolutely no contacts whatsoever to Arizona," Furuya says, "no family here, and I had never lived here, had only been through Flagstaff once other than when I did my internship. And so we really just loaded up the wagon and set up shop."

In the summer after his first year of law school, he interned at the United States Attorney's Office in Salt Lake City—and found he enjoyed prosecution. But that preference was put on hold for a while, due to a misguided letter.

In his second year, he applied to a program in the Riverside County, Calif., district attorney's office for law students. Admission to the program would mean a postgrad position and a higher starting salary. The job was also close to his parents' home.

While awaiting a response, he got a summer associate offer from Aspey, Watkins & Diesel in Flagstaff. Wanting the prosecution job, he called the D.A.'s office and asked about his prospects. He had reason to be confident, as he had done three interviews with the office. They said they'd get back to him—and the next day he received a letter declining employment. Disappointed but happy

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he hadn't put all his eggs in one basket, he accepted the AWD offer.

The next day, the prosecutor's office called with the good news that they wanted to hire him. Surprised, he mentioned their letter, and they sheepishly admitted that the No and Yes responses had been wrongly sorted. But he knew he couldn't retract his AWD acceptance.

"I'm a man of my word," Furuya told them. "I can't go back on that."

So he, his wife Kate, pregnant with their second child, and son moved to Flagstaff, where they experienced a Northern Arizona sum-mer. No surprise then that "My wife absolutely fell in love with Flagstaff."

"We used to talk about how much we loved this magical place. I remember sitting with her on the couch in our little teeny apartment with the window open and the pine tree scent wafting in and saying, 'This place is awesome.'"

Meanwhile, an AWD lawyer originally from Riverside County did a bang-up job describing to Furuya how terrible that California locality is, news he passed on to Kate.

Feeling doubly fortunate with their Flagstaff life, "She looks at me and says, 'You go get a job [at AWD],' and as the dutiful man I am, I went around to all the partners and sold myself, and wound up getting a job. So I had that offer to start after my 3L year."

Furuya is a self-described big-picture person, but he still recalls in detail missteps that taught him important lessons.

"This is one of my favorite stories," he says, "and it's not one of my shining moments."

Partner Harold Watkins had gotten a call from the court about an appearance the younger associate had missed, and he asked Furuya about it, who began to explain, "Well, my assistant didn't put it on my calendar – "

Watkins interrupted and asked him to start again. He did, again mentioning his assistant's error—and was stopped again.

"Harold points to my license and says, 'What does that mean?' And I said, it's my license to practice law. He said, 'No, not what is it, what does it *mean*?' And I have no idea. And Harold says three words. 'It's my fault. That's what that means. It's my fault. Whatever happens, it's your fault. It's not your assistant's fault, it's not your paralegal's fault, it's not your dog ate your homework. It's your fault. That means you are a professional and that's what it means to be a professional. You take responsibility for what goes on in your practice. You are the attorney. You're the one with the license to practice law. It's your fault.'"

"And I got it. Being a professional is owning what you do, in all respects."

As a leader, Furuya urges those around him to "put down the shield, take off the mask." As he describes his worst case, he asks the same of himself, and says, "I think one of my most defining moments was my worst loss."

It was 2010 by the time the five-year litigation was complete. It had gone all the way up to the Court of Appeals. Furuya recalls that before they went to summary judgment, he had told the client he was confident in the case and their theory. But his mentor, Fritz Aspey, was not, and he expressed reservations, "and I could not understand why he was so reserved about it because it seemed so clear to me. Well, we appealed—and we lost."

"I had caused my client to lose a very, very substantial amount of money because of my hubris, because I was not willing to give up my personal conviction on the matter and step back as a professional and look at things detached. I had become too invested, too personally involved in it to see the weaknesses of the position, and that loss still haunts me."

Furuya continues, "What hurt the most was the fact that the client trusted me so much that the client ignored Fritz over me. I realized that I had advocated my way into staking out that ground, and we died on that hill, and that was all me. I had to own that."

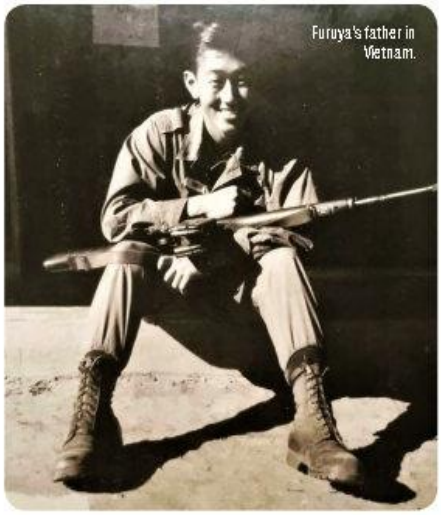
He pauses.

"It taught me that nobody is so smart or so well acquainted with something that they can't benefit from input from another, and I really have to give credit to Fritz for that. I had many mentors, but Fritz is the biggest influence on my professional career."

Aspey himself praises his former associate, unreservedly.

"Brian can see the big picture. He's a self-starter, a hard worker, and he's well liked."

He adds, "State Bar members will see that Brian handles challenges quite well, and he has a strong sense of who he is. He'll be an effective Bar leader."


Furuya's father in Vietnam.

Fellow AWD partners agree.

Don Bayles, Jr., says, "Brian is diligent and will model well the virtues of the Bar and the need for professionalism, and he treats people the way he'd want to be treated. He has a north-pointing compass that leads him in the right direction—the proverbial straight shooter."

"Brian is very even-tempered but also tenacious," says firm managing partner Whitney Cunningham. "He's strategic, and very much a long-range thinker."

Asked how Furuya might fare as organized bars are targeted, former Bar President Cunningham says, "Brian won't lead from an emotional place. He'd be a good leader in any time, but especially in a time of change."

Phoenix

Legal profession leaders speak highly of Furuya.

Former State Bar CEO John Phelps appreciates his commitment to progress and ability to persuade others.

"I'm all for collegiality, but there are occasions when the president needs to ruffle some feathers. Brian's done that when it's needed. He's also quiet and a good listener, but when he says something, it's impactful. He can be passionate without being hyperbolic."

Fellow Board of Governors member Anna Thomasson sees similar qualities.

"He has passion," says Thomasson, a public board member who is also a community advocate, consultant and Councilmember for the Town of Paradise Valley. "But

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he also has wisdom that allows him to see all sides of an issue. He knows when to be pragmatic, and when to be idealistic."

"Brian's humility drives his willingness to listen and to learn. Especially in a board of 20 lawyers, he's able to find the appropriate middle ground."

Coconino County Attorney Bill Ring agrees. He's seen Furuya's work for the civil division, where his deputy represents about a dozen fire districts, the assessor, the treasurer, the jail district, the sheriff's office, and more.

"Brian is a deliberate thinker. Knowing that all those entities rely on your advice, you have to be right. As you'd expect from someone exercising a public trust, Brian is dogged but not self-righteous."

Ring adds, "He's also an honorable and virtuous man, devoted to his family and faith—and a student of philosophy."

Window Rock

The longtime Bar leader spends much time—more than he prefers—in Phoenix. And he and his family thrive in Flagstaff. But in even just a few minutes' conversation, his affinity for Window Rock and its people emerges.

He's been licensed to practice on the Navajo Nation since 2008, and he still recalls his first visit to Window Rock.

"It was very stark going from Flagstaff, which was this vacation town—very nice, well-manicured—to Window Rock in the early 2000s. It's one road in, one road out, and there were wild dogs everywhere."

Narratives collided again for Furuya.

"I just remember thinking, how is it possible to have something like this in the middle of the United States? We're not talking about double-wide trailer parks. We're talking about abject poverty and no utilities, no services."

It's not uncommon for Furuya to open questions with "How is it possible ...," words that unearth tragic deficits in a nation's history. Stark in their power, the words are typically uttered by those who seek to make a profound difference. And as always for Furuya, answers to the queries may come from education and communication.

"Being licensed on the Navajo Nation, you're required to learn Navajo history and culture, and I found that immensely beneficial. The more I studied it, the more I found that we have more in common than we have that divides us. I think a lot of what we do is talk past each other."

Bar leaders have seen Furuya's commitment firsthand.

"Brian's focus on the public and rural Arizona is refreshing to see," says fellow Board member Jennifer Rebholz. "We have to think outside the box, because communities like Window Rock aren't even in the box."

On the board, Rebholz says, Furuya "is a hard worker, has a temperament of fairness, and is good at negotiating board members' many styles. He never looks over your shoulder at the next person to talk to."

John Phelps says, "Brian has always been concerned about access to justice in our tribal communities. He's often the strongest voice to focus on service to the public. He's never wavered in that mission."

Having witnessed the inequities that flow from misunderstanding and prejudice, Furuya recommends a Navajo strategy.

"There's this principle in Navajo law that you have to talk things out, the idea that you have to have a full, complete, respectful dialogue and exchange to resolve differences and drive away disharmony. I think that is really what is needed. People need to stop talking past each other, or over each other. Confrontation does nothing."

"Where progress can be made and collaboration and understanding can happen," Furuya says, "that's when you can find somebody who can be that intermediary between narratives and have the discussion that's needed."

That person may end up being the outsider—the stranger who comes to town.

Furuya knows the challenges facing those communities.

"I don't think anyone objects to the statement that the justice system has large flaws in it, that it is broken—more for some than for others."

"Going from one end of my district, from Kingman all the way over to Saint John's in Apache County, will take you all day. And you can't forget there are people out there living and dying and loving. They're out there, and they need help."

For Furuya, though, all efforts must start with a clear-eyed self-assessment—whether you're an individual attorney or a nation.

He pauses as he thinks of a day when he was 17 and stood with a friend on a tennis court.

"I used to swear like a sailor. I had the worst mouth you can possibly imagine. And I really stank at tennis, so I would do this John McEnroe impersonation where I raged when I missed a shot. Everybody thought it was funny, but it became a habit."

One day after joining his church, he indulged the shtick, cursing a blue streak during a doubles match.

"I look over and there's my buddy—who was skeptical about me joining the church—and he's staring at me with this big, goofy grin. I said 'What?' He looks at me and through his smile says, 'Nothing's changed.'"

"It was like someone had dumped cold water on me, and I realized that if I'm going to be a person of substance and if I actually do believe what I said I did believe, then I need to change, and so I did. I started changing."

"I have not been a perfect person in my life, and I am grateful for concepts like redemption and change. I think one of the greatest things about humanity is that we can reinvent ourselves. I believe that."

Brian Furuya is a deputy county attorney for Coconino County, in the office's civil division.

Education: B.A. and J.D., Brigham Young University

Previous legal experience: Aspey, Watkins & Diesel, Flagstaff, 2007–2015, in the areas of real estate and business transactions, landlord-tenant, appellate, personal injury, and corporate law, as well as civil litigation

Past honors and positions: National Trial Lawyers Top 40 Under 40 in 2012; Super Lawyers Rising Star, 2015 and 2016; Managing Editor of Articles, *Brigham Young University Journal of Public Law*; Adjunct Professor of Law, J. Reuben Clark Law School, teaching legal interviewing & counseling theory and technique until 2010

Admissions: All State and Federal courts in Arizona; U.S. Ninth Circuit Court of Appeals; the Navajo Nation

Family: Wife Kate; children Daniel (15-1/2), James (12) and Elizabeth (10)

Community involvement: Former member of the Board of Directors for the Coconino County Bar Association; member, Flagstaff Leadership Program class of 2013

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ATTACHMENT C

Question 62: STATEMENT RE: WHY I AM SEEKING THIS POSITION

ATTACHMENT C

ATTACHMENT C—

Question 62: Statement Re: Why I am Seeking This Position

I wish to serve on the Arizona Court of Appeals, because my heart belongs to public service, and because I want to contribute meaningfully to the strengthening of the rule of law and access to justice for Arizona's citizens. It is a mission and a work I find profoundly fulfilling, and which I feel I can best continue by adding my unique history, perspective, and abilities to the Court's essential work.

Oliver Wendell Holmes Jr. famously wrote "the life of the law … has been experience." My commitment to the rule of law stems from such experience. As mentioned previously in this Application, I am the son of a surviving Japanese Internee. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, paving the way for the forcible relocation and imprisonment of more than 100,000 persons, solely because they were of Japanese ancestry. My grandparents and their young children were included among those who lost their businesses and all their possessions, when they were removed first to Manzanar and later to Tule Lake, California. Their American citizenship did not protect them. Fear and prejudice were allowed to undermine the rule of law, as the system itself failed them. However, despite this failure, my father loves his country. He passed that love of country on to me. He showed me that even if you have nothing, you can still find success through hard work, humility, and perseverance. My family's history taught me that our Constitutional rights must be cherished, cultivated, and protected with careful vigilance. If afforded the honor of serving on Arizona's Court of Appeals, I will safekeep the sacred rights our Constitution and our laws accord our people, so that no others need suffer the indignity experienced by my father and his family.

My commitment to the cause of access to justice also grew from experience. I have a deep love for our State and its people, particularly from living and working in Northern Arizona, including on the Navajo Nation. I have been licensed to practice law on the Navajo Nation since 2008 and have taken many *pro bono* case assignments throughout the North, including in Tuba City, Chinle, Kayenta, Dilkon, and Window Rock. My license gives me the opportunity to learn about Navajo culture and customs, which informs their system of law. These experiences continually teach me to appreciate the beauty and wisdom in different ways of thinking and problem solving. If permitted to serve on the Court of Appeals, I would bring that diversity of understanding to the problems facing Arizona cases.

Living and practicing in a rural area also helped me understand the challenges that face residents in our "out counties." As the elected representative for Mohave, Coconino, Navajo, and Apache counties on the State Bar's Board of Governors, I often spoke out to ensure that the experiences and concerns of our rural residents did not get forgotten. As President of the State Bar of Arizona, I traveled across our State speaking with residents and attorneys, to promote access to justice and listen to concerns from our many different communities. This taught me patience and to listen carefully. If permitted to serve on the Court of Appeals, I would also bring these experiences and considerations to inform the work of the Court.

I believe that all of these experiences and more have inclined me towards serving in our judiciary. If I am privileged to serve as a judge on the Court of Appeals, I will use what insight, dedication, and passion I have to the interpretation of our law.

ATTACHMENT D

Question 63: PROFESSIONAL WRITING SAMPLE #1

ATTACHMENT D

ATTACHMENT D—
Question 63: Professional Writing Sample #1

Answering Brief (excerpts only)
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iii. *"Zone-of-Danger" Requirement Links Recovery with Culpability*

In Arizona, public policy has always dictated that liability of an individual for his actions must be necessarily linked to culpable conduct with regard to the injury and the victim. *See Hislop*, 197 Ariz. at 557 ("A dominant concern [with justifying limitations on NIED claims] has been the perceived need *to maintain a proportionate economic relationship between liability and culpability,* the failure to do which underlies much of the criticism of the foreseeability test") (emphasis added). It is a concern that even overrides Arizona's strong public policy interest in compensating injured plaintiffs to make them whole. *Id*.

One should only expect to be liable to a person if one acts unreasonably to cause that other person injury. In the context of NIED claims, this overriding policy of linking liability with culpable conduct is protected by the "zone-of-danger" requirement. NIED is intended to compensate those who have been harmed themselves, as opposed to those who only experience loss via a wrong done to a third party. This distinction is what makes NIED a personal claim, as contrasted with loss of consortium or wrongful death, which are both derivative. *State Farm Mut. Auto. Ins. Co. v. Connolly ex rel. Connolly*, 212 Ariz. 417, 423 (Ct. App. 2006). The "zone-of-danger" requirement ensures that the NIED plaintiff has experienced a culpable wrong to his or her own person, and therefore, is entitled to recovery in his or her own right for a separate claim. This Court explained thusly:

> The [NIED] tortfeasor did not merely affect the plaintiff by injuring someone close to the plaintiff, so the injury to the plaintiff is not solely due- to the bodily injury to another person. Instead, the negligent infliction of emotional distress plaintiffs injury is due to the unique experience of having witnessed, *at such close range as to be in the "zone of danger,"* the event that caused the injury to the

> other person. In other words, the negligent infliction of emotional distress claimant's physical injury results from the accident, *not solely from the injury to the other person*. *Connolly*, 212 Ariz. at 423 (emphasis added).

To abandon the "zone-of-danger" requirement is to divorce liability from culpability in the NIED context. This would be extraordinarily bad public policy, and seriously undermines the principles of justifiable tort recovery. It completely blurs the distinction between derivative claims like wrongful death and loss of consortium with NIED, which could no longer truly be a personal claim. Therefore, the "zone-of-danger" requirement should be retained, and the trial court's judgment upheld.

iv. *The Majority of Jurisdictions Would Deny Appellants' Recovery Under the Facts of this Case*

The Appellants insinuate in their Opening Brief that Arizona is facing a changing tide, wherein ostensibly the majority of jurisdictions would allow the Appellants to recover in NIED for their son's death under the facts of this case. This argument is not borne out by the case law. The Appellants have narrowly selected those cases most favorable to them, and those alone. While true that in an extremely limited number of jurisdictions, they *might* be able to assert their claim for NIED, the complete picture reveals that most jurisdictions would also deny the claim in these circumstances.

The Appellants would have this Court adopt an approach followed in Alaska, Connecticut, Indiana, Montana, New Hampshire, Pennsylvania, and Tennessee. They cite cases from these jurisdictions as indicative of some imagined nationwide consensus. However, all of these jurisdictions are what are known as either "pure foreseeability" jurisdictions or else are "*Dillon* foreseeability-centric" jurisdictions, meaning that they have adopted, to some extent, the constructs set forth in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), and focus primarily on foreseeability, in a factor analysis to determine eligibility for recovery in NIED. *See* Dale Joseph

Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg,* 441 P.2d 912 (Cal. 1968), *or Refinements Thereof,* 96 A.L.R.5th 107, § II (2002). Such jurisdictions allow recovery whenever emotional injury is severe and reasonably foreseeable, or else there is a balancing of factors, most determinative of which is foreseeability. *Id.* As noted by the court in *Hislop,* Arizona does:

> not find the foreseeability framework to be a particularly useful mechanism by which to ascertain and delimit a tortfeasor's liability to a bystander for emotional distress. If applied honestly, foreseeability would permit recovery in all situations where the ordinary person could reasonably predict that observing injury to another would significantly distress the particular observer.

Hislop. 197 Ariz. at 556. In other words, the *Hislop* court found foreseeability-centric analysis an inadequate way to limit NIED recovery. As *Hislop* made clear, it is not the law of Arizona, and does not properly reflect Arizona's public policies. Therefore, the Appellants' citations to cases employing foreseeability-centric tests are unpersuasive and must be rejected out of hand as against the policy of Arizona.

However, even ignoring *Hislop's* rejection of limitations adopted by *Dillon*-based jurisdictions, many of the cases cited by the Appellants do not even justify abandonment of the "zone-of-danger" requirement by Arizona under these facts.

The Appellants cite a case from Louisiana. However, Louisiana has a peculiar statute in its civil code covering NIED specifically. *See* La. Civ. Code, art. 2315.6 (allowing NIED recovery when claimant comes "upon the scene of the event soon [after accident]"). Arizona shares no such statute. Louisiana case law is not a persuasive example of the alleged abandonment of zone of danger by courts of other jurisdictions, as the legislature of that state has affirmatively provided for resolution of the issue, and not the courts.

The Appellants additionally cite cases from New Jersey, Texas, Washington, Wisconsin

and Wyoming. However, many of these jurisdictions also have a requirement that an NIED claimant "contemporaneously perceive" the injury-causing event. Others require that there be an immediate response, usually while the victim is still alive and suffering. Indeed, most of the cases cited by the Appellants are distinguishable from the facts of this case, and impose a requirement that there be some type of temporal connection or else a sensory perception of the injury-causing event, even if that was not sight. As such, the cases cited by the Appellants are largely inapplicable to the case *sub judice*.

In *Mercado v. Transport of New Jersey*, the claimant was inside her house when her son was hit by a bus directly in front of her house, and her response to the scene was immediate, being but steps from the scene. 442 A.2d 800, 801 (N. J. Super. 1980). By contrast here, the Appellants were miles away from the accident scene where their son was injured, and they did not arrive at that scene until approximately 7:00 p.m., at least thirty minutes after the accident was reported, and likely much longer after the accident and injury actually occurred. In addition, it should be noted that in New Jersey, "it has long been settled that there may be no recovery under the Wrongful Death Act for [] a claim [of mental anguish and suffering]." *Burd v. Vercruyssen*, 361 A.2d 621 (N.J. App. Div. 1976). In New Jersey, expanded recovery in NIED serves a purpose of compensating for emotional damages that are forbidden by that state's wrongful death statute. By contrast, Arizona's wrongful death statute has been held to allow for a claim for mental anguish and suffering. *City of Tucson v. Wondergem*, 105 Ariz. 429 (1970). Thus, there is no need in Arizona for expansion of the NIED tort, where recovery is already provided for by alternative claims. New Jersey's cases are an inapposite comparison to Arizona's.

The Appellants cite *Landreth v. Reed*, 570 S.W. 2d 486 (Tex. 1978) as indicative of a

trend towards allowing recovery in their own case. However, Texas has since retreated significantly from *Landreth* in allowing the late-arriving claimant who did not "contemporaneously perceive the accident" to recover for NIED. A much more recent Texas case makes this clear:

> the undisputed facts in this case show that [the NIED claimant] was not at the scene when the accident occurred. She did not see or hear the crash. The emotional impact that she undoubtedly suffered did not result from a sensory and contemporaneous observance of the accident. In this regard, [the claimant] is in the same position as any other close relative who sees and experiences the immediate aftermath of a serious injury to a loved one. . . . The fact that [the claimant] arrived on the scene while rescue operations were underway and witnessed her daughter's pain and suffering at the site of the accident rather than at the hospital or some other location does not affect the analysis.

United Servs. Auto. Ass'n v. Keith, 970 S.W.2d 540, 542 (Tex. 1998). These facts are exactly the same as those presented in the case at bar, and Texas denied the plaintiffs NIED recovery. In the case at bar, the Appellants neither saw nor heard the accident, and arrived on the scene as emergency crews and others worked. Under those similar facts, the Texas Supreme Court observed that "[a]lthough [Texas has] not insisted that a bystander must be within a "zone of danger" to recover, Texas law still requires the bystander's presence *when the injury occurred and the contemporaneous perception of the accident*." *Id*. (emphasis added). Thus, it is apparent that Texas is not a jurisdiction that would allow the Appellants to recover for NIED, because there was no "contemporaneous perception" of the accident. The citation to *Landreth* is both misleading and unpersuasive, since Texas apparently would not allow recovery for the Appellants under the present facts anyway.

Finally, the Appellants cite *Hegel v. McMahon*, 960 P.2d 424 (Wash. 1998), *Bowen v. Lumbermens Mutual*, 517 N.W. 2d 432 (Wis. 1994), and *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986) as somehow aligning with Arizona's public policies as expressed in *Hislop*. This is

not so. Contrary to their unsupported and unexplained assertion, Arizona's public policies are not aligned with either Wisconsin or Wyoming as far as NIED limitation is concerned. As mentioned previously, *Hislop* stands for the policy that NIED claims must be limited directly by those factors set forth in *Keck*, and affirmatively states that the more pressing public policy involved is for limitation and control of the class of claimants to protect against unlimited liability. *Hislop*, 197 Ariz. at 557-58.

In total, the Appellants cite cases from just thirteen jurisdictions as representative of the implied changing tide against use of the "zone-of-danger" requirement, and by implication, would allow them to recover on a theory of NIED. However, most jurisdictions would not allow the Appellants to recover under the facts presented. A brief compilation follows:

> Four jurisdictions, Colorado [*Scharrel v. Wal-Mart Stores. Inc.*, 949 P.2d 89 (Colo. Ct. App. 1997)], Minnesota [*Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534 (Minn. Ct. App. 1994)], Oklahoma [*Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 1996 OK 141, 916 P.2d 241 (Okla. 1996)] and Virginia [*Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (Va. 1973).], do not allow recovery under any circumstances for emotional distress caused by witnessing negligent injury to another as a separate cause of action."

Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger*, 89 A.L.R. 5th 255 at I, § 2[a] (2001). Thus, in all of these jurisdictions, the Appellants would not be able to recover in NIED.

The so-called "impact rule," where a bystander claimant must be physically touched in some way by the defendant's negligence, is still followed in five jurisdictions, Arkansas [*Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959) (applying Arkansas law)], Georgia [*Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 533 S.E.2d 82, 89 A.L.R.5th 711 (Ga. 2000)], Kansas [*Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (Kan. 1988)], Kentucky

[*Michals v. William T. Watkins Memorial United Methodist Church*, 873 S.W.2d 216, 90 Ed. Law Rep. 870 (Ky. Ct. App. 1994)] and Oregon [*Sherwood v. Oregon Dept. of Transp.*, 170 Or. App. 66, 11 P.3d 664 (Or. 2000)]. Under the impact rule, the Appellants also could not recover, because they were not present to experience any impact from the accident.

The "zone-of-danger" requirement is followed in 11 jurisdictions. Arizona [*Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979)]; Delaware [*Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. 1965)]; Dist. of Columbia [*Williams v. Baker*, 572 A.2d 1062 (D.C. 1990)]; Illinois [*Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1 (Ill. 1983)]; Maryland [Resavage v. Davies, 86 A.2d 879 (Md. 1952)]; Missouri [*Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595 (Mo. 1990)]; New York [*Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984)]; North Dakota [*Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972)]; South Dakota [*Nielson v. AT&T Corp.*, 1999 SD 99, 597 N.W.2d 434 (S.D. 1999)]; Utah [*Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992)]; and Vermont [*Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92 (Vt. 1980)]. Of course, the Appellants cannot recover in NIED under the "zone-of-danger" requirement.

Of the remaining jurisdictions, twenty-nine follow some form of the *Dillon v. Legg* decision. 441 P.2d 912 (Cal. 1968). However, of them, many still require that the accident or injury-causing event be "contemporaneously perceived" by any NIED claimant for a valid cause of action to exist. The following states' cases would not permit the Appellants to recover for NIED under the facts of the case at bar: California [*Arauz v. Gerhardt* 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (Cal. Ct. App. 1977)]; Florida [*Longbehn v. Pub. Health Trust of Miami-Dade County*, 661 F. Supp. 2d 1326 (S.D. Fla. 2009) (applying Fla. Law)]; Iowa [*Fineran v. Pickett*, 465 N.W. 2d 662 (Iowa 1991)]; New Mexico [*Gabaldon v. Jay-Bi Property Management. Inc., 1996 NMSC-055*, 122 N.M. 393, 925 P2d 510 (N.M. 1996)]; Texas [*United Servs. Auto. Ass'n v.*

Keith. 970 S.W. 2d 540 (Tex. 1998)]; West Virginia [*Stump v. Ashland. Inc.*, 201 W. Va. 541, 499 S.E. 2d 91 (W. Va. 1997)].

The Appellants' "overview of jurisdictions" appears intended to suggest that Arizona is behind the times, and to bolster their argument that the "zone-of-danger" requirement is archaic and has therefore outlived its usefulness. The citations are meant to give a sense that Arizona faces an inevitable changing tidal wave of authority to abandon the "zone-of-danger" requirement that it should join. As has been shown, the Appellants citations lend virtually no strength to their argument. Those jurisdictions listed above would not permit them to bring their NIED claim and represent more than half of all jurisdictions in the United States.

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ATTACHMENT E

Question 63: PROFESSIONAL WRITING SAMPLE #2

ATTACHMENT E

ATTACHMENT E—
Question 63: Professional Writing Sample #2

Answering Brief (excerpts only)

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a. *The Trial Court Correctly Ignored* Gregorio *as Contrary to Arizona Law.*

State Farm argues that the reasonable expectations doctrine allegedly can only be used to subtract a boilerplate provision, and cannot be used to add coverage that is not otherwise found somewhere within the printed terms of the written insurance documents, no matter what promises its agents may have made to its customers during negotiations. Opening Brief, at pp. 20–23. State Farm bases its argument on misinterpretation of the reasonable expectations doctrine by a federal judge visiting from West Virginia in *Gregorio v. GEICO Gen. Ins. Co.* (815 F.Supp.2d 1097 (D. Ariz. 2011). Opening Brief, at pp. 23–27. The trial court concluded that the *Gregorio* case does not correctly identify or apply Arizona law on the reasonable expectations doctrine. Instead, the trial court found that the law set forth in *Gordinier v. Aetna Cas. & Sur. Co.* (154 Ariz. 266 (1987)) controls. Because the *Gregorio* case is wrongly decided, the trial court's decision to not apply it to this case should not be disturbed.

i. The Trial Court Correctly Determined that the* Gregorio *Decision Misconstrues Arizona Law.

Gregorio was correctly ignored by the trial court, because the decision misconstrues Arizona law by restricting the reasonable expectations doctrine in violation of the clear standards set forth in *Gordinier* and other Arizona cases.

In *Gregorio*, judge Goodwin states, without citation to authority, that "Courts cannot [] invoke the doctrine [of reasonable expectations] to add language to a policy to grant coverage not otherwise provided for." Gregorio, 815 F.Supp.2d at 1106. Judge Goodwin conjectured, also without citation, that allowing the addition of coverage "would mark a significant departure from the way the

doctrine has been applied in Arizona." Id. The resulting restriction created by judge Goodwin's conclusions forms the primary basis for State Farm's legal position on appeal. However, both statements are contrary to the [four applications] set out in *Gordinier*.

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The *Gregorio* decision imposes a new limitation that nothing outside the four-corners of the printed boilerplate insurance policy can be interpreted to grant coverage not provided for by the written policy. This new limitation makes at least two of the four stated applications presented in *Gordinier* meaningless.

As quoted above, *Gordinier* calls for application of the reasonable expectations doctrine where some activity attributable to the insurer "creates an objective impression of coverage in the mind of a reasonable insured" and also where such activity "has induced a particular insured to reasonably believe that he has coverage, ***although such coverage is expressly and unambiguously denied by the policy***." Id. (emphasis added). By contrast, *Gregorio* would not allow the doctrine to be applied, unless coverage can first be found somewhere in the written insurance documents. Gregorio, 815 F.Supp.2d at 1106. The *Gregorio* Court's conclusion in this regard is bewildering and directly contrary to *Gordinier*. Judge Goodwin quotes exactly this language from *Gordinier*. Gregorio, 815 F.Supp.2d at 1104. Then, in the very next sentence, judge Goodwin concludes:

> The insurer's actions, however, can only be taken into account when the court is considering whether to enforce boilerplate terms in a contract. The above-language does not suggest that Arizona courts can consider an insurer's actions to supplement a policy with additional terms.

Gregorio, 815 F.Supp.2d at 1105. There is no explanation to resolve the inconsistency with this conclusion and the direct language of *Gordinier* to the contrary. There is also no citation to any Arizona authority for the proposition. It was created out of whole-cloth by judge Goodwin.

The requirement of *Gordinier* to apply the doctrine even in the face of unambiguous

language in the printed policy that denies coverage clearly demonstrates that *Gregorio* is wrongly decided. Therefore, *Gregorio*'s new restriction on the reasonable expectations doctrine is not in harmony with Arizona law.

[*Gordinier*] is not the only Arizona decision that the *Gregorio* opinion violated by its erroneous reasoning. As related previously, the *Darner* Court cited *Southern Casualty v. Hughes*, (33 Ariz. 206 (1928)) for the proposition that an insurer will be bound to provide coverage contrary to the express terms of the policy ***because of the oral representations*** which had been made with regard to that coverage. Darner, 140 Ariz. at 392. Clearly, in Arizona, coverage must be found when the insurer, or its agents, have acted to give the impression of coverage to the insured, even when only oral representations provide that coverage, and even when "such coverage is expressly and unambiguously denied by the policy." Gordinier, 154 Ariz. at 273. This is true, even if the coverage is provided for only in oral promises made by the insurer. *See e.g.*, Darner,140 Ariz. at 392; Hughes, 33 Ariz. at 206.

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State Farm, nevertheless, maintains that *Gregorio* is rightly decided. Opening Brief, at p. 23. It does not provide an explanation for the holding's contradiction of Arizona law, nor does it attempt to reconcile that contradiction. Instead, State Farm merely accepts *Gregorio*'s holding as good law, because it "did an exhaustive analysis and synthesis of the 'reasonable expectations' doctrine under *Arizona law*, including citation to" *Darner, Gordinier* and other Arizona cases. Id. State Farm also appears to rely simply upon judge Goodwin's status as a federal judge to argue that *Gregorio* is a correct expression of Arizona law. *See* Id. ("State Farm Fire will leave it to the Court to decide whether the analysis of the 'reasonable expectations' doctrine by Fisk's attorneys or a federal judge has more merit"). None of this changes the fact that *Gregorio* is wrongly decided and does not reflect Arizona law.

While true that judge Goodwin reviews Arizona cases, he ultimately ignored them in favor of an analysis that focuses primarily on contract ambiguity as a prerequisite for consideration of insurer actions. *See* Gregorio, 815 F.Supp.2d at 1106. In other words, one never even gets to the reasonable expectations doctrine, unless one can first show that the insurance documents are facially inconsistent (and thus, ambiguous). As noted above, under Arizona law, ambiguity is not even relevant to application of the reasonable expectations doctrine, because (where proper circumstances pertain) it must be applied even in the face of an *unambiguous* denial of coverage by the contract. *Gordinier*, 154 Ariz. at 273. Instead, *Gordinier* holds the principal inquiry must be what caused the insured to reasonably expect coverage. Id. *Gregorio* is wrongly decided, primarily because that question is completely ignored.

The result in *Gregorio* makes no sense in the context of Arizona law, and certainly not when *Gordinier* provides for exactly the opposite conclusion. However, *Gregorio* is completely consistent with what judge Goodwin was familiar with in West Virginia. Appellee points to *Blake v. State Farm Mut. Auto. Ins. Co.* (224 W.Va. 317, 325 n.6, 685 S.E.2d 895, 903 n.6 (2009)) and *Lukiart v. Valley Brook Concrete & Supply, Inc.* (216 W.Va. 748, 755, 613 S.E.2d 896, 903 (2005)) as instructive of West Virginia's restrictive understanding of the reasonable expectations doctrine in that jurisdiction. Per these cases, the reasonable expectations doctrine is not addressable by courts in West Virginia, unless a contract is first deemed to be both adhesive *and* facially ambiguous. Id. That restrictive view of the doctrine is the standard effectively applied by judge Goodwin in *Gregorio*. Gregorio, 815 F.Supp.2d at 1106.

These West Virginia cases illustrate how judge Goodwin came to his erroneous restriction of Arizona's reasonable expectations doctrine. Judge Goodwin's statements favoring restrictive view on the doctrine, as well as the extensive citation of secondary sources critical of the doctrine,

indicate a heavy bias existed against its proper interpretation under the more expansive Arizona case law. Despite his discussion of Arizona case history, judge Goodwin's reliance on lack of ambiguity in the insurance contract as pivotal proves he either did not understood Arizona law on reasonable expectations doctrine, or did not apply it. In essence, he paid lip service to Arizona law, but clearly adopted a West Virginia construction and policy on restrictive application of the doctrine by introducing a brand new (and erroneous) limitation to it. As explained above, the restriction is directly contrary to Arizona law as expressed in *Gordinier*. Despite State Farm's derision, a wrongly decided decision is still contrary to the law, even if a federal judge is the one doing the analysis.

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ATTACHMENT F

Question 64: ARBITRATOR WRITING SAMPLE #1

ATTACHMENT F

ATTACHMENT F—
Question 64: Arbitrator Writing Sample #1

Decision of Arbitrator (edited for length)

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Findings of Fact

The arbitrator finds as follows:

This case concerns an infection received by Chase Conor Pileggi (hereafter "Pileggi" or "Plaintiff") after obtaining a tattoo, which he received at Burly Fish, LLC's (hereafter "Burly Fish" or "Defendant") place of business, Burly Fish Tattoo & Piercing. Burly Fish has been providing body art and piercing services since 1999. One of its owners, Patrick Sans, has been working as a professional tattoo artist for 28 years. Approximately 7 years ago, Mr. Sans apprenticed one Darren Babbitt within Burly Fish, so that Mr. Babbitt could learn the tattoo artist trade. Mr. Babbitt underwent an approximately 2-year-long apprenticeship before becoming a tattoo artist himself. For the past 5 years, Mr. Babbitt has worked as a tattoo artist under an exclusive independent contractor arrangement with Burly Fish, whereby Mr. Babbitt does tattooing for clients with the use of Burly Fish's facilities. Mr. Babbitt remits a portion of his fees for tattooing work to Burly Fish, to pay for use of these facilities.

On or about November 5, 2014, Mr. Pileggi went to Burly Fish to receive a tattoo. Due to the unavailability of Mr. Sans, Mr. Pileggi agreed to receive a tattoo from Mr. Babbitt. Prior to receiving any tattooing work, Mr. Pileggi was given a consent and acknowledgment form, which he signed. This consent form acknowledges specifically that "infection is always possible as a result of obtaining a tattoo." Mr. Pileggi selected a design, which was "outlined" that day. This initial tattoo work done at Burly Fish by Mr. Babbitt for the Plaintiff healed without incident.

On or about November 19, 2014, Mr. Pileggi returned to Burly Fish to have "shading"

work done, in order to complete the tattoo design. Both parties agree that following Mr. Pileggi's receipt of this second session of tattoo work, he experienced a bacterial infection. Further, both parties agree that Mr. Pileggi was admitted to the Flagstaff Medical Center for treatment of this bacterial infection on November 22, 2014 and discharged from the hospital on November 25, 2014. The duration of Mr. Pileggi's hospitalization is not in dispute. Neither is there any dispute as to the amount of charges incurred due to the treatment of Mr. Pileggi's bacterial infection. Rather, the dispute in this case relates to the source and/or cause of Mr. Pileggi's bacterial infection.

At the arbitration hearing, Mr. Pileggi testified that at both of his appointments at Burly Fish, the instruments for applying a tattoo (including the needles to be used) were already out of their sterile packaging, and the tattoo gun apparatus already pre-assembled at the time he was walked back to receive his tattoo from Mr. Babbitt. Mr. Pileggi also testified that at his November 19th tattoo session, he observed Mr. Babbitt mix tattoo ink with tap water in a disposable cup with what appeared to him to be a "popsicle stick." Mr. Pileggi testified that the mixing of the ink with tap water was particularly concerning to him, but he did not address these concerns to Mr. Babbitt at the time. These are the only two activities to which Mr. Pileggi referred as the source of his infection.

For the Defendant, Mr. Babbitt testified that at both the November 5th and November 19th tattoo sessions for Mr. Pileggi, Mr. Babbitt cleaned his station prior to seating Mr. Pileggi. Mr. Babbitt further testified that while he laid out the components of the tattoo apparatus and other receptacles and supplies he would need, he did not open the sterile packaging, nor did he pour inks to be used prior to seating Mr. Pileggi at his station. Mr. Babbitt testified that this was his normal and customary practice and was consistent with his training. Mr. Babbitt testified that he

used premixed inks at both tattooing sessions for Mr. Pileggi, and rinsed his equipment when necessary with distilled, bottled water, which had been additionally sterilized using UV light. Mr. Babbitt testified that he did not use tap water at any time during the tattooing sessions with Mr. Pileggi. Jessica Stoney testified at the hearing as to the tattoo she received from Mr. Babbitt on November 16, 2014. The process described by Ms. Stoney conformed to the general process and procedures testified to by Mr. Babbitt. Mr. Sans testified that the process described by Mr. Babbitt in his prior testimony was consistent with the policies and procedures adopted by Burly Fish, and conformed to the training Mr. Sans had provided to Mr. Babbitt during the latter's apprenticeship. The Defendant provided the Affidavit of Elicia Guerra, signed and notarized on April 22, 2016, wherein Ms. Guerra discussed a tattoo she received from Mr. Babbitt on November 19, 2014, the same day that Mr. Pileggi had his second tattooing session. Ms. Guerra's affidavit describes a session that generally conforms to the procedures and practices described by Mr. Babbitt during his testimony.

Plaintiff's and Defendant's accounts with regard to the opening of packaging and use of tap water to mix ink are factually incompatible. After careful consideration of all evidence, including the testimony that was observed, the arbitrator finds the testimony of Mr. Babbitt, Ms. Stoney, Mr. Sans and Ms. Guerra to be more credible. The arbitrator finds the accounts described by these witnesses to be factual, and are hereby adopted for purposes of this Decision.

Mr. Pileggi testified that he followed all aftercare instructions as they were written and explained to him. Mr. Pileggi testified that an hour or two after his appointment, he unwrapped his tattoo, washed it, put Bactine on it, then re-wrapped it with Saranwrap, and then went to sleep. He further testified that he repeated this process every few hours, including throughout the night. The arbitrator finds a portion of this testimony to be inconsistent with Mr. Pileggi's

response given on or about December 24, 2015 to a non-uniform interrogatory propounded upon him by Defendant (specifically, "Interrogatory No. 22").

Mr. Pileggi testified that within hours after completing his second tattooing session on November 19, 2014, he felt unwell, and experienced concerning increases in pain, redness, and tenderness at the tattooing site. The arbitrator finds this testimony to be at least somewhat inconsistent with Mr. Pileggi's medical records (specifically, "Emergency Department Report," disclosed by Flagstaff Medical Center as page 15 of 297; "FMCH Internal Medicine Admission History & Physical," disclosed by Flagstaff Medical Center as page 19 of 297; "Infections Disease Progress Note," disclosed by Flagstaff Medical Center as page 32 of 297), wherein Mr. Pileggi stated to hospital personnel that he first began noticing concerning symptoms the day after the tattooing session of November 19, 2014 (i.e., first on November 20, 2014). As noted previously, Mr. Pileggi went to sleep and did not call Burly Fish or seek medical attention. Mr. Pileggi testified further that when he awoke the following day on November 20, 2014, his tattoo was more painful, red, swollen, and had turned yellow. Mr. Pileggi testified that he experienced vomiting at that time. Mr. Pileggi testified further that he took the day off of work, as planned, to recuperate, and played video games. On this day, Mr. Pileggi did not call Burly Fish, nor seek medical attention. Mr. Pileggi testified that his symptoms intensified on November 21, 2014, but he did not call Burly Fish, nor seek medical attention. Mr. Pileggi testified that on November 22, 2014, his family members observed his condition, and insisted that he seek medical attention.

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Plaintiff provided the report of Dr. Edward J. Perrin, M.D., dated April 21, 2016. Dr. Perrin stated in this report his belief that Mr. Pileggi's bacterial infection was "directly caused by the receipt of a tattoo that was applied using non-sterile equipment and/or supplies." Dr. Perrin

states that his opinion is "in agreement with the medical professionals at Flagstaff Medical Center." Mr. Pileggi testified at the hearing that Dr. Perrin did not examine him or interview him personally. The arbitrator finds Dr. Perrin's opinions to not carry substantial weight in this case. The arbitrator notes that Dr. Perrin's report takes exceptional license in characterizing the information and conclusions found in the medical records disclosed by Flagstaff Medical Center. While those records nearly uniformly reference Mr. Pileggi's tattoo as the source of his bacterial infection, none attribute the infection, proximately or otherwise, to non-sterile equipment and/or supplies used during the tattooing process. This and other issues with Dr. Perrin's report led the arbitrator to conclude that the opinions therein were not to be substantially relied upon.

Defendant provided the report of Dr. Matt Wise, dated April 7, 2016. This report does not specifically comment on Mr. Pileggi's tattoo or offer an opinion about causation or lack thereof. In that sense, the report of Dr. Wise is less germane. However, Dr. Wise's report does provide instruction on the general nature of bacteria and bacterial infections, which were helpful in this case.

Conclusions of Law

I. Res Ipsa Loquitur

One of Plaintiff's stated causes of action was entitled "Res Ipsa Loquitur." At the arbitration hearing, Defendant moved for a directed verdict at the close of Plaintiff's case. The arbitrator granted this motion only as to the cause for *res ipsa loquitur*. The following provides the reasoning for this order.

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Furthermore, the necessary conditions for application of the *res ipsa loquitur* doctrine are: "(1) the accident must be of a kind which ordinarily does not occur in the absence of

someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of defendant; (3) it must not have been due to any voluntary action on the part of the plaintiff; (4) plaintiff must not be in a position to show the particular circumstances which caused the offending agency or instrumentality to operate to his injury." Jackson, 118 Ariz. at 31-32, 574 P.2d at 824-25 (internal citations omitted).

In this instant case, evidence was introduced that establishes that Plaintiff cannot demonstrate that his injury was caused by an agency or instrumentality within the exclusive control of Defendant. Specifically, Dr. Wise's report establishes that bacteria that can cause infections of the kind that injured Plaintiff are found in many areas throughout Plaintiff's environment, and not just within Burly Fish's place of business. The medical records in this case additionally indicate that the wound itself was the entry place for the bacteria. It appears clear that control of the wound equates to control of the possibility of infection. While Defendant certainly had some access to the wound, since it was coextensive with the tattooing, Plaintiff's wound was not in the exclusive control of Burly Fish. Further, although he cannot be said to have invited the infection, it has not been disputed that Plaintiff received the wound (i.e., the tattoo) voluntarily. Plaintiff signed an acknowledgment that evidences this very fact. Because Defendant did not have exclusive control over Plaintiff's tattoo wound, and also because Plaintiff received the tattoo as a voluntary action to receive a wound in the first instance, the doctrine of *res ipsa loquitur* is not applicable to this case. Id.

II. Negligence

Having dismissed Plaintiff's claim for *res ipsa loquitur*, the claim of negligence remains Plaintiff's sole surviving claim.

"To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty

requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." Gipson v. Kasey, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007). Plaintiff's damages are clear, and not substantially in dispute as to existence, although they were disputed as to amount. The remaining elements of Plaintiff's claim are discussed below:

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B. Breach

Breach of a legal duty is a factual inquiry and concerns a defendant's compliance with the applicable standard of care. Gipson, 214 Ariz. at 143, 150 P.3d at 230. Standard of care is defined as "[w]hat the defendant must do, or must not do ... to satisfy the duty." Id. With regard to the question of breach of a business owner's duty to an invitee, "[w]e begin with the premise that a store owner is not an insurer of the safety of his patrons." *See* Moore v. Sw. Sash & Door Co., 71 Ariz. 418, 422, 228 P.2d 993, 995 (1951). A business owner's duty is to exercise reasonable care for safety of his invitees. Bloom, 130 Ariz. at 449, 636 P.2d at 1231 (*citing* McGuire v. Valley Nat'l Bank of Phx., 94 Ariz. 50, 381 P.2d 588 (1963) *and* Walker v. Montgomery Ward & Co., Inc., 20 Ariz. App. 255, 258, 511 P.2d 699, 702 (1973)).

Here, the relevant inquiry revolves around Defendant's tattooing practices vis-à-vis Plaintiff, and whether those practices reflect exercise of reasonable care on the part of Defendant for the safety of Plaintiff. Put more expressly, Plaintiff has pointed to two specific instances where Defendant allegedly breached its duty; namely, Plaintiff alleged that Mr. Babbitt had the tattooing apparatus out of sterile prepackaging and fully assembled for an unknown amount of time prior to his being seated at Mr. Babbitt's station and that Mr. Babbitt mixed tap water with ink on his tattoo.

Preliminarily, it should be noted that Plaintiff's argument that the tattooing ink was mixed with tap water, and that this constituted a breach of Defendant's duty, is legally infirm from its inception. The Body Art Code of Coconino County clearly states that "the mixing of approved inks, dyes, or pigments or their dilution with water from a public water system is acceptable." Environmental Services Code, Rules and Regulations of the Coconino County Public Health Services District (the "Code"), at § 20-6-2(G). The arbitrator finds that this Code provision is intended to protect those receiving tattoos in Coconino County like Mr. Pileggi, and therefore is applicable in this case to set the standard of care. *See* Martin v. Schroeder, 209 Ariz. 531, 536, 105 P.3d 577, 582 (Ct. App. 2005) ("court may derive a standard of care from a statute if it first determines that the statute's purpose is in part to protect a class of persons that includes the plaintiff and the specific interest at issue from the type of harm that occurred and against the particular action that caused the harm."). Because mixing of ink with water from a public water system is acceptable under the Code, it would not be a breach of Defendant's duty to Plaintiff, even assuming that it had been done.

The Code additionally provides that "[a]ll instruments used for tattooing/body piercing shall remain stored in sterile packages until just prior to the performance of a body art procedure. When assembling instruments used for body art procedures, the operator shall wear disposable medical gloves and use medically recognized techniques to ensure that the instruments and gloves are not contaminated." Code at § 20-6-2(F). Plaintiff alleged that when he was brought back to Defendant's tattooing station, the tattooing apparatus had already been assembled, with all implements out of packaging. Plaintiff did not testify as to how long the implements had been out of packaging, nor that they had been assembled without use of gloves. Defendant testified that all packaging had been opened in Plaintiff's presence, just prior to tattooing, and the

tattooing apparatus assembled and ink poured thereafter while Mr. Babbitt was gloved.

As related in the arbitrator's findings of fact, Defendant presented credible evidence from Mr. Sans, Ms. Stoney, and Ms. Guerra of Defendant's standard practices and procedures when giving tattoos to clients. Plaintiff objected to this testimony, arguing it was evidence of "other acts" and violated Rule 404(b) of the Arizona Rules of Evidence. The arbitrator overruled the objection and regards all such as evidence of Defendant's routine practices, and thus admissible under Rule 406, Ariz. R. Evid. Here, Mr. Babbitt credibly testified that he observed the regular policies and practices taught to him during his apprenticeship, and also followed the standard for tattooing at Burly Fish. The evidence provided by Mr. Sans, Ms. Stoney, and Ms. Guerra establish that the manner in which Mr. Babbitt specifically administered to Mr. Pileggi's tattoo was consistent and in accordance with the habitual and routine practices in place at Burly Fish. Thus, the arbitrator finds the evidence supports the conclusion that there was no breach in this case of any duty to Mr. Pileggi by Defendant or by Mr. Babbitt.

C. Causation

"In a cause of action for negligence, plaintiff must show some reasonable connection between defendant's act or omission and plaintiff's damages or injuries. Thus, plaintiff bears the burden of proof on the issue of proximate cause . . . The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." Robertson v. Sixpence Inns of Am., Inc., 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990) (internal citations omitted).

In the present case, the arbitrator has found that Defendant did not open the sterile packaging for the tattooing apparatus until just before Plaintiff's tattooing and also that

Defendant did not mix tap water with ink to use in Plaintiff's tattooing. Plaintiff pointed to no other conduct attributable to the Defendant that was the cause of his bacterial infection. Dr. Perrin opined that it was much more likely than not that Plaintiff's infection was the result of the use of non-sterile tattooing equipment/supplies. However, the arbitrator finds Dr. Perrin's opinion to be of little help, and derived from non-personal knowledge, based upon an unwarranted characterization of Mr. Pileggi's medical records. Mr. Babbitt credibly testified to his observance of cleanliness and sterilization while administering the tattooing of Mr. Pileggi. Additionally, Mr. Sans credibly testified about the standards of cleanliness and sterilization that his business is expected to adhere to, which included procedures that exceeded minimum required standards as outlined in the Code. Further, Mr. Pileggi testified that he regularly re-wrapped his tattoo with Saranwrap, which was in contravention to the aftercare instructions provided to him by Mr. Babbitt at Burly Fish. Finally, Dr. Wise's report informs the arbitrator of the abundant presence of bacteria in the environment, including that which surrounded Mr. Pileggi. In view of all the evidence, the arbitrator concludes that Plaintiff has failed to establish that any act by, or attributable to, Defendant was a proximate cause of Plaintiff's injuries.

Decision

For the foregoing reasons, and in view of the findings of fact and conclusions of law, the arbitrator hereby finds in favor of the Defendant. The Defendant shall submit to the arbitrator a proposed form of award, and a verified statement of costs and serve same upon opposing party, within ten (10) days from the date of this Notice.

ATTACHMENT G

Question 64: ARBITRATOR WRITING SAMPLE #2

ATTACHMENT G

ATTACHMENT G—
Question 64: Arbitrator Writing Sample #2

Order re Arbitration Discovery Dispute

Pending before the Arbitrator, pursuant to Rule 74, Ariz. R. Civ. P., is Plaintiff's combined "Motion to Quash Defendant's Subpoena Duces Tecum, Motion for Protective Order, and Motion for Sanctions." This combined motion was filed February 29, 2016. As provided for by Rule 7.1(a), upon the filing of a motion, "[e]ach opposing party shall within ten days thereafter serve and file any answering memorandum." The Arbitrator did not receive any answering memorandum, and the time for filing the same has now passed. No request for oral argument has been made, and the Arbitrator determines that oral argument would not assist in the resolution of the motions at hand. Further, failure to file an answering memorandum permits summary disposal of the pending combined motion. *See* Rule 7.1(b), Ariz. R. Civ. P. Therefore, the Arbitrator finds and rules as follows:

General Matters

Preliminarily, it should be observed that according to the Rules of Civil Procedure, "if the opposing party does not serve and file the required answering memorandum [to a motion], . . . such non-compliance may be deemed a consent to the denial or granting of the motion." Rule 7.1(b), Ariz. R. Civ. P. However, Arizona courts have repeatedly made clear that Rule 7.1(b) is not mandatory, and the failure to respond does not, in and of itself, authorize a relief against the nonmoving party if the motion fails to demonstrate the movant's entitlement to the requested relief. *See* Zimmerman v. Shakman, 204 Ariz. 231, 237, 62 P.3d 976, 982 (Ct. App. 2003). Therefore, while Defendant's failure to file a response can be deemed a consent to the granting of the relief in the combined motions, there must still be an independent justification demonstrating Plaintiff's entitlement to the relief requested as to each motion. Each motion, thus,

must be evaluated in turn, and it must appear that Plaintiff is entitled to the relief requested.

Motion to Quash

Plaintiff's Motion to Quash concerns a Notice of Deposition of Custodian of Records and Subpoena Duces Tecum propounded by Defendant upon Empire Smoke Shops, LLC, which is Plaintiff's place of employment. These requests were propounded by Defendant on or about February 17, 2016, and generally seek production of all employment records relating to Plaintiff that are in the possession of Empire Smoke Shops, LLC.

The standard for discoverability is set forth in Rule 26, which provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Rule 26(b), Ariz. R. Civ. P.

Plaintiff asserts that because he makes no claim for lost wages in the instant case, his employment records are necessarily and unmistakably irrelevant to the subject matter of this case, and this entitles him to an order quashing the subpoena. For its part, Defendant's counsel contended in emails exchanged with Plaintiff's counsel that the information sought is indeed relevant. Plaintiff's argument rests upon the presumption that the *only* relevant information within employment records, as concerns a personal injury claim, relates to hours worked and potential wages lost as a result of the injury. Thus, his conclusion that the absence of a wage claim in this case makes Plaintiff's employment records automatically irrelevant. However, Plaintiff's conclusion is flawed in the premises. It is true that a claim for lost wages would definitively make employment information and documentation relevant to a personal injury case. But, this is not the only information to be found in employment records that would be relevant to a personal injury claim, nor the only reason that employment records may be relevant to this specific case, even though Plaintiff has waived any claim for lost wages. As an example,

employment records will usually corroborate the fact that a claimant took time off (or did not take time off) during the time of alleged suffering due to a personal injury. The fact of an employee-plaintiff's absence from work due to an injury could substantiate the severity of claimed pain and suffering, which would assist the trier of fact in determining both the predicates of liability and/or the amount of damages. This example is merely one way in which employment records may be relevant to personal injury cases, even in the absence of a claim for lost wages. Therefore, objection on the basis of relevance alone will not sustain the relief requested by Plaintiff, and would require denial of the motion without additional justification for the relief requested.

That said, when ruling on discovery motions within the context of a mandatory arbitration, arbitrators are directed to "consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims and *shall limit discovery whenever appropriate* to insure compliance with the purposes of compulsory arbitration." Rule 74(c)(3), Ariz. R. Civ. P. (emphasis added). The requirement found in Rule 74(c) is mandatory.

Here, the Defendant has not articulated any basis for establishing that the information sought is necessary or essential to its defenses. To the contrary, counsel for the Defendant acknowledged in correspondence (attached to the combined motions) that it is entirely possible that nothing Defendant intends to use would be revealed through the discovery obtained from the employer. While some information may be relevant, it also appears equally likely that all such information may alternatively be obtained through discovery directed to the Plaintiff, or Plaintiff's witnesses, or is otherwise not essential to Defendant's defense of this case. The Arbitrator finds that limitation of discovery is appropriate in this instance as requested, because Defendant has shown no necessity for the evidence found solely in the possession of Empire

Smoke Shops, LLC. Further, Defendant has tacitly consented to this limitation by its failure to file a response to the Motion to Quash. *See* Rule 7.1(b), Ariz. R. Civ. P.

Therefore, for good cause shown, it is:

> ORDERED granting Plaintiff's Motion to Quash. Defendant's Notice of Deposition and Subpoena Duces Tecum propounded upon Empire Smoke Shops, LLC are hereby quashed.

Motion for Protective Order

Plaintiff next moves for a protective order pursuant to Rule 26(c), Ariz. R. Civ. P. Plaintiff argues he is entitled to this relief, because Defendant did not articulate specifically the relevance of Plaintiff's employment file, thereby making Defendant's discovery annoying, embarrassing, oppressive, or imposing of undue burden or expense. Plaintiff requests that a protective order be issued precluding Defendant from obtaining irrelevant information.

As Plaintiff points out, no party is entitled to use discovery procedures to compel production of irrelevant information. However, as outlined above, the information sought by Defendant was not *per se* irrelevant. The Arbitrator finds that Defendant's request was "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1)(A), Ariz. R. Civ. P. Nevertheless, Defendant failed to establish that such requested discovery is of the nature or character to make it necessary or indispensable enough to its defense to overcome the injunctive of Rule 74(c)(3), Ariz. R. Civ. P. Further, an order mandating the parties to refrain from what the Rules already forbid would be needlessly duplicative.

Because Defendant's discovery request was not annoying, embarrassing, oppressive, or imposing of undue burden or expense, and because the Arizona Rules of Civil Procedure already provide the requirement that parties refrain from using discovery procedures to obtain irrelevant

information, it is hereby:

ORDERED denying Plaintiff's Motion for Protective Order.

Motion for Sanctions

Finally, Plaintiff requests that sanctions be ordered against Defendant and Defendant's counsel, jointly and severally. Plaintiff cites A.R.S. § 12-349(A) and argues that Defendant's counsel has unreasonably expanded the proceedings and/or engaged in abuse of discovery. As support for his argument, Plaintiff attaches emails exchanged between the parties' counsel. The offending conduct appears to be primarily Defendant's pursuit of allegedly irrelevant information (i.e., the employment records) via the discovery process, as well as Defendant's refusal to withdraw the requests when Plaintiff contested the relevancy of the documents, as well as an alleged failure on the part of Defendant's counsel to properly confer with Plaintiff's counsel regarding the discovery dispute.

As discussed above, the Arbitrator finds that the information sought by Defendant was reasonably calculated to lead to the discovery of admissible evidence, and therefore, relevant to the case. As such, use of the discovery process to attempt to obtain this information was not abusive. It is only in the context of compulsory arbitration (which should be a comparatively inexpensive and limited process), in which this discovery is properly denied because of requirements to limit discovery wherever appropriate, even where information would otherwise normally be properly discoverable. *See discussion above*. But for this context (and Defendant's tacit consent to the limitation imposed), the motion to quash should have been denied. Abuse of discovery, therefore, does not provide sufficient grounds to order sanctions against either Defendant or its counsel.

Another basis for sanctions concerns Plaintiff's argument that Defendant's counsel unreasonably delayed and expanded the proceedings and failed to properly confer with Plaintiff's counsel. After reviewing the emails exchanged, the Arbitrator finds that these communications

establish a genuine disagreement as to the question of relevance. They do not evidence any unreasonable expansion of the proceedings or any undue delay. There are seven communications in total, which span only a few days. The Arbitrator finds no failure to confer; only an impasse as to a debatable issue. The Motions here seek resolution of that debatable issue. The Arbitrator finds that Defendant and its counsel had a good faith reason to pursue its position, and no undue delay or expansion of the proceedings is evident from the documents provided to the Arbitrator.

As there was no abuse of discovery, nor unreasonable delay or expansion of the proceedings, nor failure to properly confer, therefore, it is hereby:

ORDERED denying Plaintiff's Motion for Sanctions.